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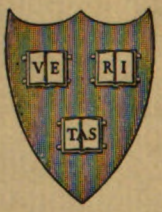

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THE MISCELLANEOUS REPORTS

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court

WILLIAM V. R. ERVING, REPORTER

VOLUME XCIX

1917

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8 Appointed by the Governor, January 22, 1917, in place of Benjamin N. Cardozo, appointed by the Governor a Judge of the Court of Appeals to fill a vacancy.

9 Appointed by the Governor January 10, 1917, in place of Cuthbert W. Pound, elected as an Associate Judge of the Court of Appeals.

10 Appointed by the Governor February 28, 1917, in place of Chester B. McLaughlin, appointed by the Governor a Judge of the Court of Appeals to fill a vacancy.

11 Appointed by the Governor April 23, 1917, in place of William L. Ransom, resigned.

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING FEBRUARY, 1917.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* ETHEL BYRNE, Defendant.

(Supreme Court, Kings Special Term for Motions, February, 1917.)

Constitutional law — statutes — when legislature may in exercise of police power determine that general dissemination of information and sale of certain articles are prejudicial to morals — when motion for certificate of reasonable doubt denied — appeal — Penal Law, § 1142.

A statute which violates no constitutional provision will not be declared void because deemed by some to be opposed to natural justice.

The legislature in the exercise of the police power may determine whether the general dissemination of information upon the subject of birth control and the sale of articles designed to prevent conception are prejudicial to public morals and inimical to the welfare and interests of the community.

That some do not agree with such legislation and may feel aggrieved thereby does not make it unconstitutional, nor can it be deemed class legislation because those who favor birth control believe that the right to spread such doctrine should not be curtailed.

Where defendant was convicted of a violation of section 1142 of the Penal Law upon proof that she sold an article to be used by women to prevent conception and in conjunction therewith disseminated literature dealing with the question of conception and setting forth various ways and means by which it could be

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prevented, a motion for a certificate of reasonable doubt on the sole ground that said statute is unconstitutional will be denied.

Where an appeal from such conviction is undetermined the fact that the governor released defendant from imprisonment before the expiration of her sentence does not preclude a decision of said motion.

MOTION for a certificate of reasonable doubt.

Harry E. Lewis, District Attorney (Harry G. Anderson, of counsel), for People.

Jonah J. Goldstein, for defendant.

CROPSEY, J. The defendant stands convicted. The information in Special Sessions charged the violation of section 1142 of the Penal Law and also contained a count under section 1141. The evidence introduced showed that the defendant had sold an article to be used by women, which was designed to prevent conception. This was the basis of the information and resulting conviction. The article was not worth more than fifty cents, but was sold by the defendant for two dollars. In conjunction with the sale the defendant disseminated literature dealing with the question of conception and setting forth various ways and means by which it could be prevented. One of these pamphlets is labeled "What Every Girl Should Know." This contains matters which not only should not be known by every girl, but which perhaps should not be known by any. The distribution of these pamphlets, especially to girls just coming into womanhood, would be a shocking disgrace to the community. The defendant claims that her undertaking in furnishing this information and these appliances is prompted by a sole desire to benefit her sex. However that may be, the evidence shows there was a decidedly commercial aspect to the undertaking, for

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not only was the article sold at a great profit but in addition a regular fee was charged to each visitor; and the visitors numbered 100 or more a day.

The defendant moves for a certificate of reasonable doubt. She urges as her only point that the statute under which she has been convicted is unconstitutional. Her claim is that the statute is unreasonable and oppressive and contains no exception, that it is not an exercise of the police power as it does not promote the health, life, morals or welfare of the community, and that it interferes with the free exercise of conscience and the pursuit of happiness.

Section 1142 of the Penal Law was enacted in 1887, and section 1141 was amended in the same year. Both sections have been enforced since that time and a number of convictions had under them. They have never been held unconstitutional. Section 1142 makes it a crime to sell, give away, or exhibit, or offer so to do, or have in possession with such intent, or to advertise for sale or distribution, any article or drug for the prevention of conception, or purporting or represented to be for that purpose, or to give information orally as to when or where such an article or drug can be obtained, or to manufacture either the article or drug. It is urged by the defendant that this is an unreasonable and oppressive enactment, in that it prevents women who do not wish to bear children from adopting means to obviate that result. But this section is not directed against the use of such articles or drugs. It merely prohibits their manufacture and distribution. If it did in terms prevent the use of the articles and made their use a crime, it would nevertheless be constitutional. And this would be so, even if there were no exception made to the provision.

The defendant contends that the statute violates sections 1 and 6 of article I of the State Constitution

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and the Fourteenth Amendment of the Federal Constitution. Section 1, referred to, provides: "No member of this State shall be * * * deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." Section 6 declares that no person shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment is of similar purport.

Unless restrained or prohibited by the Constitution, the legislative power is unlimited. The claim that statutes may be declared void because deemed to be opposed to natural justice, when they do not violate any constitutional provision, does not find support in law. *Bertholf* v. *O'Reilly,* 74 N. Y. 509; *People* v. *West,* 106 id. 293; Tiedeman State & Federal Control, 9; Cooley Const. Law, 30. The so-called police power is vested inherently in the legislature and is not derived from any constitutional provision. It has never been surrendered, but on the contrary has been exercised to the fullest extent. *House* v. *Mayes,* 219 U. S. 270, 282; *South Carolina* v. *United States,* 199 id. 437, 454. The Fourteenth Amendment to the Federal Constitution did not interfere with the exercise of this power by the states. *Barbier* v. *Connolly,* 113 U. S. 27, 31; *Keller* v. *United States,* 213 id. 138, 145.

It is undisputed that by the exercise of the police power the state may regulate the relative rights and duties of all persons within its jurisdiction, so as to guard the public safety, protect the public morals, secure the public health and promote the common good and welfare. *House* v. *Mayes, supra; Jacobson* v. *Massachusetts,* 197 U. S. 11, 25. Can it be said that this statute was not properly enacted under the exercise of this power?

The person asserting the unconstitutionality of an

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enactment has the burden of establishing his contention. All legislative acts are presumptively constitutional and they will not be nullified unless it is clearly shown that they were in excess of legislative power (*Chicago, B. & Q. R. R. Co.* v. *McGuire,* 219 U. S. 549, 565, 567; *Price* v. *Illinois,* 238 id. 446, 453; *Rast* v. *Van Deman & Lewis,* 240 id. 342, 357, 365); even "The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance." *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, 699.

The police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111. It justifies the enactment of laws designed for the protection of the public and to guard against some danger, real or anticipated, in our social or commercial life. *People ex rel. Nechamcus* v. *Warden, etc.,* 144 N. Y. 529, 535. The general and long continued belief as to the desirability or necessity for the legislation must be considered in determining its constitutionality. *Muller* v. *Oregon,* 208 U. S. 412, 420, 421; *Matter of Viemeister,* 179 N. Y. 235, 240.

It was proper for the legislature to determine whether the general dissemination of information upon the subject of birth control and the sale of articles designed to prevent conception were prejudicial to public morals and inimical to the welfare and interests of the community. That this defendant does not agree with the legislation and feels aggrieved that it should have been enacted does not make it unconstitutional. The claim is that she and others believe that there should be birth control and that the right to spread that doctrine should not be curtailed, but this does not make the enactment class legislation. *Peo-*

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ple v. *Havnor*, 149 N. Y. 195; *People ex rel. Armstrong* v. *Warden*, 183 id. 223; *Wither* v. *Bloem*, 163 Mich. 419; 35 L. R. A. (N. S.) 628. The same situation exists regarding most, if not all, statutes defining the different crimes. Some people will protest because the enactments do not agree with their views. The legislature has declared that the spread of information on this subject and the sale of articles designed to accomplish its objects are acts detrimental to public morals and welfare. The defendant has not shown this to be otherwise, and the court is of the opinion that the public good justified the passage of this statute and requires its enforcement. The state has the "primary right of self preservation" (*People* v. *Most*, 171 N. Y. 423, 431), and the question of propagation is necessarily related to this right.

The literature distributed by the defendant is as harmful as the use of the articles sold. The book, entitled "What Every Girl Should Know," is especially objectionable, as has been stated. It contains pictures of certain organs of a woman, in addition to the text concerning which comment has already been made. The distribution of this book and the diffusion of knowledge of its contents, especially among girls and boys coming into the period of adolescence, would produce most harmful results. The information would make people generally believe that by using the means suggested the act of intercourse could be had without the fear of resulting pregnancy. While there are other reasons that keep unmarried people from indulging their passions, the fear that pregnancy will result is one of the potent ones. To remove that fear would unquestionably result in an increase of immorality.

A statute making it a crime to advertise of the treatment or cure of venereal diseases has been held to be

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a valid exercise of the police power of the state, as it is against public policy to advertise that such diseases can be easily and cheaply cured; "it has a decided tendency to minimize unduly the disastrous consequences of indulging in dissolute action." *State* v. *Hollinshead,* 77 Ore. 473, 477; 151 Pac. Rep. 710. See, *also, People* v. *Kennedy,* 176 Mich. 384, 395 *et seq.* The defendant in the *Hollinshead* case could have claimed, as does this defendant, that his act in advertising was in the interest of the people who could be benefited by his treatment, but that is not the question which determines the constitutionality of statutes.

The contention that the section is unconstitutional because it "interferes with the free exercise of conscience and the pursuit of happiness" could probably be made by some defendant against every penal statute. No authority is cited in support of this contention. If such individual's conscience and desire for happiness were to determine whether a law is constitutional, none of them could be upheld. Defendant's counsel, in his brief, says that by this statute "a woman is denied her absolute right of enjoyment of sexual relations unless the act be so conducted that pregnancy may be the result of the act. This clearly is an infringement upon her free exercise of conscience and pursuit of happiness." The same statement could be made with equal force about the statute defining adultery or a statute that might be enacted making fornication a crime, or any other definition of a crime.

We have discussed the question as though there were no exceptions in the statute. But section 1145 of the Penal Law provides that physicians may use or prescribe the drugs and articles referred to in sections 1141 and 1142, "for the cure or prevention of disease," and that such articles may be supplied to them or on their prescription. The defendant main-

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tains that this is not an exception as it does not permit physicians generally to use the articles when necessary, but only to work a cure or prevent a disease. We read this section otherwise. Under it, a physician would be justified in prescribing the prohibited articles or drugs, if in his opinion the health or condition of the patient required it. *People* v. *Byrne,* N. Y. L. J., Dec. 5, 1916.

There is no reasonable doubt of the constitutionality of the statute in question, and as the guilt of the defendant is clear, the motion for a certificate of reasonable doubt must be denied.

The fact that the governor has thought it proper in the exercise of the power given to him by the Constitution to release this defendant from her imprisonment before the expiration of her sentence does not make the decision of this motion an academic one. The appeal from the conviction still stands unless withdrawn, and hence this motion should be passed upon.

Motion denied.

The PEOPLE OF THE STATE OF NEW YORK, ex rel. P. J. CARLIN CONSTRUCTION Co. and CALLAHAN KINGSLEY Co., INC., Relators, *v.* WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, Respondent.

(Supreme Court, Kings Special Term for Motions, February, 1917.)

Greater New York Charter, §§ 149, 1541 — provisions of — contracts — mandamus — when comptroller required to certify to sufficiency of available funds — awarding of contract when appropriation made before acceptance of bids valid.

Under section 149 of the Greater New York Charter, which declares that no contract made by any of the department heads shall be of any force unless the comptroller shall indorse upon

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it his certificate that there is an unexpended balance of an appropriation sufficient to cover the amount of the contract and that it shall be his duty to make such indorsement if there remains unapplied and unexpended such amount, the performance of said duty, a mere ministerial act, is enforcible by mandamus.

Under said section the comptroller is required to certify to the sufficiency of available funds at the time he makes the certificate.

The provision of section 1541 of the Greater New York Charter, prohibiting the head of any department from incurring any expense until an appropriation therefor has been made, does not require that the appropriation shall be made before bids for public work are invited; that the appropriation is made before the acceptance of the bids and the awarding of the contract is sufficient.

Where bids for certain public work exceed the amount of an appropriation therefor an additional appropriation made before the bids were accepted is valid, and the comptroller should furnish the certificate required by section 149 of the city charter.

APPLICATION for a peremptory writ of mandamus.

Pressinger & Newcombe (Richard S. Newcombe and Frank L. Cunningham, of counsel), for relators.

Lamar Hardy, corporation counsel (R. Percy Chittenden and Benjamin Shapiro, of counsel), for respondent.

Edward H. Wilson, for Jacob C. Klinck, appearing by permission of the court.

CROPSEY, J. The relators apply for a peremptory writ of mandamus requiring the respondent to certify contracts made by them with the city of New York for remodeling and improving the Kings county court house. Section 149 of the charter provides that no contract made by any of the department heads shall

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be of any force unless the comptroller shall indorse upon it his certificate that there remains unexpended a balance of an appropriation made for the purpose sufficient to cover the amount of the contract. And that section further provides that "It shall be the duty of the comptroller to make such indorsement upon every such contract so presented to him, if there remains unapplied and unexpended such amount." The question raised is whether the certificate speaks as of the time it is made or of the time the bids are received and whether moneys are available within the meaning of this section which were not appropriated when the bids were received but which have since been appropriated.

Before any bids were invited, the sum of $600,000 was appropriated by the proper city authorities for the doing of the work. The work was divided into three classes as required by law (Laws of 1912, chap. 514; Greater N. Y. Charter, § 419), one covering the general construction including electrical work and elevators and another covering heating and ventilating and the third covering plumbing. Bids were invited and were received but they all exceeded the amount of the appropriation, the lowest ones amounting to $669,549. Thereupon all the bids were rejected and new bids were invited upon a readvertisement. The lowest of these new bids totalled $662,910. The lowest bidders for two portions of the work were the relators. Without any action being taken upon these bids the situation was presented to the board of estimate and apportionment and it by proper resolution increased the amount of the appropriation to $720,000 — the $120,000 thus added to this appropriation being transferred from an unexpended balance of another appropriation. This action was made final and effective by

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virtue of the failure of the board of aldermen to act within the time required by the charter (§ 48) and by the failure of the mayor of the city to take any action thereon. Greater N. Y. Charter, § 40.

Thereafter contracts were awarded by the borough president to the relators and to a third concern which was the lowest bidder on the other branch of the work, and still later contracts were executed by the relators and bonds filed as required by law, and still later these contracts were executed by the borough president and were transmitted to the respondent as the comptroller of the city for his certification and registration. The comptroller has refused the certification and hence this proceeding was instituted. His refusal is based upon the claim that as a sufficient appropriation had not been made at the time the bids were received no subsequent appropriation can be made available.

Under section 149 of the charter the act of certification required of the comptroller is ministerial. "The duty to endorse his certificate is expressly imposed by statute. The performance of the duty is enforcible by writ of mandamus, a remedy against the delay upon which plaintiff's claim is based, and a remedy that is certain, reasonable, adequate and exclusive." *New York State Construction Co.* v. *City of New York,* 163 App. Div. 227, 232. See, to same effect, *Beckwith* v. *City of New York,* 121 App. Div. 462, 464. And the comptroller is required to certify to the fact regarding the sufficiency of available funds "as it exists when the certificate is made" and not as of any other time. *People ex rel. Gibbons* v. *Coler,* 41 App. Div. 463–465. Section 1541 of the charter prohibits the head of any city department from incurring any expense unless an appropriation has been previously made covering such expense. At the time the borough

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president accepted the bids and executed the contracts the appropriation of $720,000 had been made and it is conceded that that amount is now available unless the court shall hold that it cannot properly be used, because it was not all appropriated before the bids were invited.

There appears to be no provision of the charter or other statute requiring that appropriations must be made before bids are invited for the doing of public work. At least no such provision has been referred to by counsel and none has been found by the court. In the absence of such a provision there can be no question that bids could be properly invited without any previous appropriation having been made. In fact in that way an economy might be effected for if it was not generally known what amount the city expected to expend the bids might be less in amount. Of course no bid so received could be legally accepted and no contract entered into until a sufficient appropriation had been made, as section 1541 of the charter prohibits the incurring of any expense until the appropriation is available. But there is nothing in the law that would prohibit a proper appropriation being made after the bids were received, and nothing to prevent thereafter the acceptance of the lowest bid and the awarding of the contract. In such a case the comptroller would be required to furnish the prescribed certificate. If it be argued that this method might work to the disadvantage of the city the answer must be that that cannot be regulated or controlled by the courts, but such suggestion should be addressed to the legislature, for in the absence of a statutory provision such a method of inviting bids and making the appropriations would be both proper and legal.

But it is claimed that because an appropriation was

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made for the work in question before bids were invited and because the bids exceed the amount so appropriated no subsequent appropriation making up the necessary amount can ever be available. In other words, the claim is that having made an appropriation and bids having been received, all of which exceed the amount of the appropriation, the bids can never be accepted even though an additional appropriation is made before such acceptance and that in such case there must be a readvertisement. There is no provision of the charter or statute which supports this contention or requires such a determination. Nor does there appear to be any sound reason why such a provision should be made. But if it be deemed wise the matter is one for legislative action and not for judicial determination. As the legislature has merely required that sufficient funds must have been appropriated before any expense is incurred and has not said that the appropriation must be made before bids are invited it is a complete compliance with the charter requirements that the appropriation shall in fact have been made before the bid is awarded or the contract made, that is, before any expense is incurred, and it matters not whether such appropriation was made wholly before the bids were invited or wholly after they were invited or partly before and partly after they were invited. As has been stated the courts have nothing to do with the wisdom of the existing provisions of the charter. They cannot legislate even if it seems to be desirable. Their duty is to uphold the law and not to make it. As no expense was incurred before a sufficient appropriation was made and as that appropriation is now available the comptroller should furnish a certificate to that effect as required by section 149 of the charter.

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The comptroller claims that he has refused the certificate because of the language used in *Williams* v. *City of New York,* 118 App. Div. 756; affd., 192 N. Y. 541; and in *Clarke Co.* v. *Board of Education,* 156 App. Div. 842; affd., 215 N. Y. 646; and in *Klinck* v. *Pounds,* N. Y. L. J., Nov. 25, 1916, opinion by Pendleton, J. It is a fact that the language used in the *Williams* case is broad enough to cover the situation that exists here and if that language was to be literally followed it would require a denial of this application. It is, however, apparent and is conceded that the language referred to formed no necessary part of the decision and that the determination of the question here raised was not involved in that case. In the *Williams* case the plaintiff sought to recover damages from the city caused by its refusal to execute a contract claimed to have been awarded to the plaintiff therein. The facts briefly are these. An appropriation of $39,000 had been made for the doing of certain work; bids were invited and the lowest of them exceeded the sum appropriated; thereupon the city department having charge of the work accepted the lowest bid " subject to the approval of the board of estimate and apportionment and the board of aldermen of the resolution requesting an additional appropriation;" the board of estimate did authorize additional appropriation but before the board of aldermen had done so (and both authorizations were essential to its validity) the city department in question notified the plaintiff that his bid was rejected, as the present amount of the appropriation was insufficient; thereafter the security deposited by the plaintiff with the comptroller was returned; later the board of aldermen did approve the additional appropriation and its action was confirmed by the mayor. This case is authority only for the proposition that a conditional

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award of a contract made without sufficient appropriation is a nullity; in other words, that an appropriation must be made before the contract is entered into. With that decision no one takes issue, but it has no bearing upon the facts in this case for here no conditional award was made and there was a sufficient appropriation available at the time the contract was made.

In the *Williams* case it is said that the bid was invalid when made, but it has not been possible to find any basis for that statement. If bids could be invited before any appropriation had been made and then after the making of the appropriation they could be accepted, there seems to be no reason why they should be invalid when made merely because some appropriation (though an insufficient one) had been made before they were received. It may well be to the interests of the city to permit the heads of departments to hold bids which exceed the amount of the appropriation until a further appropriation can be made. It may be in the interest of economy that this should be done. But, whether or not that be so, there is nothing in the statute to prohibit it and no reason is shown for any adverse action by the court. To hold void the contracts made in this case, as the language in the *Williams* case would require, would entail loss to the contractors and possibly give rise to a right of action against the city. *Lynch* v. *City of New York*, 2 App. Div. 213; *Pennell* v. *City of New York*, 17 id. 455; *Beckwith* v. *City of New York*, 121 id. 462.

The suggestion in the *Williams* case that bidding might be curtailed when the amount of the appropriation was known before the bids were invited and the bids could not come within that amount can find no support here. There is nothing to show that the

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amount of the appropriation was known to the bidders, and, even if it was known, the papers show that fourteen bids in all were submitted. Moreover each bidder must be presumed to know that under the charter an additional sum can be appropriated after the bids are received to make the amount sufficient. In fact, the resolution of the board of estimate and apportionment of May 5, 1916, approving the plans and authorizing the advertising for bids under the $600,000 appropriation, expressly advised all bidders that in certain contingencies the amount of the estimated cost "may be reconsidered" by that board. This was the equivalent of saying that the appropriation might be increased, if the bids exceeded the amount of it. All bidders had equal knowledge and equal rights. There is no suggestion of fraud in this case. Apparently there is a reasonable and truthful explanation for the bids being so much in excess of the amount of the original appropriation, but with that we have no concern.

It should be frankly stated that if the language used in the *Williams* case formed a part of the actual decision made, this court at Special Term would probably feel obliged to follow it regardless of all else, and although it is not a part of the actual decision it has been carefully considered as it should be because of the standing of the justice who wrote it. But after such full consideration it does seem that the language referred to is not justified by the law and that it is the duty of this court to express its own opinion upon the matters in question and to make its decision as appears to it to be proper. In *Clarke Co.* v. *Board of Education*, 156 App. Div. 842, a situation existed similar to that in the *Williams* case and the opinion was written by the same justice. The memorandum opin-

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ion of Mr. Justice Pendleton in *Klinck* v. *Pounds*, N. Y. L. J., Nov. 25, 1916, recognizes that the language in the *Williams* case is merely *dictum*, but adds that the scope of that opinion requires that there must be a new advertisement for bids in the present case. He presents no argument and merely accepts the language in the *Williams* case as controlling. The same court which decided the *Williams* and *Clarke* cases allowed a recovery against the city on a contract made before the appropriation was available, where the appropriation was subsequently made. *O'Rourke Engineering Const. Co.* v. *City of New York*, 140 App. Div. 498–502.

Relators' application must be granted and a peremptory writ of mandamus must issue requiring the comptroller to furnish his certificate as required by the charter provision. The order to be entered on this decision and the writ to be issued may both be settled on notice.

Ordered accordingly.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* BENJAMIN MCINTYRE and JOSEPH MCINTYRE, Defendants.

(Supreme Court, Kings Special Term for Motions, February, 1917.)

Criminal law — when pardon does not wipe out conviction for crime as affecting a second offender — indictment — evidence — witness — trial — Code Crim. Pro. §§ 482-a, 485-a, 514-a, 941, 943, 944-a.

A pardon does not wipe out a conviction for crime to the extent of preventing it from being used as the basis of an indictment and proof upon a charge of being a second offender. Sections 482-a, 514-a and 944-a of the Code of Criminal Pro-

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cedure relating to proof of prior convictions are not exclusive, and upon the trial of an indictment for assault in the second degree charged as a second offense, defendant's prior conviction may be shown either in accordance with the rules of the common law or by any other competent proof.

Where defendant as a witness in his own behalf admits his prior conviction, an error in receiving an extract of the minutes of the prior trial which did not comply with the provisions either of the Code of Civil Procedure or the Code of Criminal Procedure, nor proved by any competent evidence, is harmless.

Whether the defendant was a second offender was a question for the jury, and a charge that if they found that the assault for which defendant had previously been convicted came within the definition of assault in the second degree they should find him guilty as a second offender, though erroneous, was harmless, defendant having been convicted on the last trial only of assault in the third degree.

Under sections 485-a, 941 and 943 of the Code of Criminal Procedure, requiring certain information to be transmitted to the secretary of state concerning the pedigree and previous record of one convicted of crime and authorizing his examination in order to obtain it, information as to former arrests of convicted persons not resulting in conviction is not required to be furnished, and it is clearly improper to admit in evidence on a subsequent trial the answers made upon an examination under said sections showing prior arrests.

APPLICATION for a certificate of reasonable doubt.

Denis O'Leary, District Attorney (James F. Barry, of counsel), for plaintiff.

Dana Wallace, for defendants.

CROPSEY, J. The defendants were indicted in the County Court of Queens county for the crime of assault in the second degree, and as to Benjamin McIntyre the crime was charged as a second offense. Both defendants were convicted of assault in the third degree,

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and having been sentenced they now apply for certificates of reasonable doubt.

Two errors are principally urged. One, that proof of defendant Benjamin McIntyre's previous conviction should not have been admitted because he had been pardoned for that offense. The record shows that the previous offense was assault, that he had been found guilty and fined an amount which he had paid, and that several years later he had been pardoned by the governor and his rights of citizenship restored. A pardon removes the legal infamy of the crime, but it does not take away guilt or wash out the moral stain; and, as Hale says, "it makes not the man always an honest man." 2 Hale P. C. 278. A pardon takes away the penalty directly attaching to the offense but it does not destroy the fact that the crime was committed, nor that the person had been convicted of it. *Baums* v. *Clause,* 5 Hill, 196. "It is manifest that the appellant's pardon and restoration to the rights of citizenship had no retroactive effect upon the judgment of conviction which remains unreversed and has not been set aside. We think the effect of a pardon is to relieve the offender of all unenforced penalties annexed to the conviction, but what the party convicted has already endured or paid, the pardon does not restore." *Roberts* v. *State,* 160 N. Y. 217, 221.

While there is some contrariety of opinion (34 L. R. A. 402, note; 24 L. R. A. [N. S.] 435, note), the better reasoned authorities, including those of this state, are to the effect that a pardon does not wipe out the conviction to the extent of preventing such conviction from being used as the basis for indictment and proof upon a charge of being a second offender or an habitual criminal. *People* v. *Price,* 53 Hun, 185; affd., 119 N. Y. 650; *People* v. *Carlesi,* 154 App. Div. 481; affd., 208 N. Y. 547; affd., *sub nom. Carlesi* v.

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New York, 233 U. S. 51. The pardon in the *Carlesi* case seems to have been the same in substance as that in the present case and Mr. Justice Miller, writing for the Appellate Division, said that the decision was put upon the broad ground that, notwithstanding an absolute pardon, the prior conviction could be made the basis of conviction as a second offender. Mr. Justice Laughlin concurred, but upon the ground that the pardon was not unlimited. The Court of Appeals, however, affirmed the Appellate Division upon the opinion of Mr. Justice Miller.

The language of the United States Supreme Court, in *Ex Parte Garland,* 4 Wall. 333, is very broad. Read in connection with the decision then made, it has been repeatedly followed, but the language evidently was not intended to be a holding in conflict to the views set forth in the *Carlesi* case. In the *Garland* matter, there was a general pardon and amnesty of persons participating in the War of the Rebellion, and it was intended to restore to such persons who came within its operation the same rights and privileges which they had possessed before the war.

That a pardon does not have the effect claimed by defendant is inferentially shown by the provisions of section 514-a of the Criminal Code, which provides that the certificate of a warden of a state prison " shall be *prima facie* evidence on the trial of any person for a second or subsequent offense, of the imprisonment and discharge of such person, either by pardon or expiration of his sentence." It is further shown by the provisions of section 1022 of the Penal Law, and the necessity for that provision is stated in *People* v. *Price,* 53 Hun, 185, 188.

The other error claimed is that it was error to permit the prosecution to introduce in evidence an extract of the clerk's minutes showing, among other things, the

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prior conviction of the defendant Benjamin McIntyre. This extract was from the minutes of the same court in which the present case was being tried, and contains no certification other than the words, " a true extract from the minutes." This is signed by the clerk and the seal of the county is affixed.

It is claimed that the method of proving a prior conviction is prescribed by the Criminal Code, and that this extract of minutes does not comply with those provisions. There are three separate methods provided in the Criminal Code for the proving of prior convictions, but these provisions are not exclusive. They do not restrict the method of furnishing such proof but on the contrary extend it. They prescribe additional ways in which such proof may be offered. It may be offered by any of the methods permitted in civil cases. Crim. Code, § 392. That may be in accordance with the rules of the common law or by any other competent proof (Code Civ. Pro. § 962), or by a certified copy of the paper or transcript of the record. Id. § 933. The original clerk's minutes of course could be received in evidence when properly proved, or a certified copy of them could be admitted when properly certified. The certificate must state that the transcript or copy of the record has been compared with the original and that it is a correct transcript of the whole thereof. Code Civ. Pro. § 957. If the certifying officer has an official seal, that must be affixed. Id. § 958. But the seal is not required on the certified copy of a transcript or record of a court, where it is used in the same court. Id. § 959.

The provisions of the Criminal Code relating to the proof of prior convictions are found in sections 482-a, 514-a and 944-a. Section 482-a makes admissible a copy of the minutes of any conviction with the sentence of the court thereon, duly certified and sealed by the

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clerk, together with a certified copy of the indictment on which the conviction was had, where "*it shall appear by the certificate of the clerk, or otherwise, that no record of the judgment on such conviction, has been signed and filed.*" This section appears to be of little service. At least that has been the experience in Kings county, for, with the possible exception of a case in which sentence was suspended, it has not been possible to get a certificate as required by that section, to the effect that no record of the judgment has been signed and filed.

Section 514-a makes admissible the certificate of the warden of any state prison, under his seal, containing the name of the person convicted, the date and term of sentence and other particulars, for the purpose only of proving such conviction on a trial for a second offense. And section 944-a makes admissible a somewhat similar statement of the secretary of state, for the same purpose.

The extract of minutes offered by the people did not comply with any of the provisions of either the Civil or Criminal Code. Nor were those minutes proved by any competent evidence. Their admission in evidence was therefore error, but the defendant Benjamin McIntyre took the stand in his own behalf and then admitted this prior conviction. This made the error in receiving the extract of minutes harmless. In his charge the judge told the jury that if they found that the assault came within the definition of assault in the second degree they should find the defendant Benjamin McIntyre guilty as a second offender because the question of his former conviction was not at issue. This was error, for whether a defendant is a second offender must always be left to the jury, even though the defendant admits it. *People* v. *Marendi*, 213 N. Y. 600, 618. But this error, too, is harmless, for

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the jury did not find the defendants guilty of assault in the second degree. The verdict was one of guilty of assault in the third degree. The court had charged that if that was the verdict the question of second offense was not to be considered.

It is claimed that there was harmful matter contained in the extract of minutes outside of the fact of defendant Benjamin McIntyre's previous conviction. After reciting the indictment, conviction and sentence, the extract continues by stating that the defendant was examined on oath and said, among other things, that he had been "arrested four or five times, charge assault, never in prison." These statements were evidently made in taking the defendant's pedigree, as it is commonly called. The statute requires certain information to be transmitted to the secretary of state and the sheriff of the county of persons convicted and authorizes the examination of the defendant in order to obtain it. Code Crim. Pro. §§ 941, 943, 485-a. But no such information as the former arrests of convicted persons, not resulting in conviction, is required to be furnished. The district attorney stated that such questions had always been asked in his county, and the minutes of the present trial show that similar questions were asked of both defendants after their conviction. While there may be no impropriety in asking the questions on the taking of their pedigree, it clearly is improper to admit in evidence on a subsequent trial the answers made to them showing prior arrests. But the minutes of this trial seem to indicate clearly that the defendants are guilty, and for that reason the error in admitting the fact of the prior arrests was not prejudicial.

There are many other claims of error made in the motion papers — in fact every exception taken on the trial is recited. They have all been reviewed and con-

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sidered and there seems to be no error in any of them. For the reasons stated, no certificate of reasonable doubt can be granted. The motion is therefore denied.

Motion denied.

Matter of the Application of THE CITY OF NEW YORK, Relative to Acquiring Title, etc., for the Opening of Lawrence Avenue, etc.

(Supreme Court, Kings Special Term for Motions, February, 1917.)

Deeds — what passes by — descriptions contained in — parties to — mortgages — when no additional property passes — insertion of words "being the same premises."

Nothing passes by a deed of conveyance except what is described therein, no matter what the intention of the parties may have been.

Where the description of land, by metes and bounds, stated in a purchase-money mortgage, does not include land in the street, the insertion of the words "being the same premises" conveyed to the mortgagor passes no additional property though the land in the street was expressly included in the deed to the mortgagor.

APPLICATION to obtain payment of an award.

Benjamin Trapnell, for the petitioner.

Lamar Hardy, Corporation Counsel (Paul Jones and Andrew C. Troy, of counsel), for the City of New York.

CROPSEY, J. This is an application to obtain payment of an award made to an unknown owner. The proceeding covers many streets, among them a portion of East Fifteenth street, and the parcels in question

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were taken upon the opening of that street. Prior to June, 1911, the property in question lying in East Fifteenth street and the abutting property on both sides of that street were owned by people named Luck. In June, 1911, they conveyed to the Creekhurst Realty Company the property situated on both sides of East Fifteenth street describing each parcel by metes and bounds and adding that the conveyance included all right and title to property located in the street. This deed also conveyed a third piece of property not located on East Fifteenth street and which did not abut upon either of the other parcels. At the time of making this conveyance the Creekhurst Realty Company gave a purchase money mortgage to Wood-Harmon Warranty Corporation. This mortgage covered the three parcels conveyed by the deed and by similar descriptions of metes and bounds but it did not contain any reference to the land in the street. It did, however, contain the provision that the premises so mortgaged were "the same premises which were conveyed to the party of the first part by deed delivered and intended to be recorded simultaneously herewith, this mortgage being a purchase money mortgage and given to secure a portion of the purchase money or consideration in said deed expressed." The mortgage contained the further provision that the mortgagee should have the option in any foreclosure action to have the premises sold as one parcel. Later there was a foreclosure of this mortgage and a sale thereunder and a deed made to the mortgagee who took an assignment of the bid. This was in September, 1912. Some time later the city took title to the land in question in this proceeding and later awards were made. The Wood-Harmon Warranty Corporation has applied for those awards claiming it was the owner of the land taken at the time title vested in the city. The matter

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has been referred and the referee's report has now been returned. He recommends that the application of the petitioner be denied on the ground that no title in it is shown.

There are no controverted questions of fact. The only question is one of law arising out of the construction to be given to the mortgage, as to what property was covered by it.

The description of each of the three parcels described in the mortgage is a complete description of that parcel. The metes and bounds are given and each of the descriptions describes a complete piece of property. The mortgage does not expressly cover any land in East Fifteenth street and if the provision that the premises mortgaged were the same as those conveyed to the mortagor was not contained in the mortgage there could be no question that the land in the street was not covered by it. The question is whether the insertion of that provision has the effect of making the mortgage cover the land in the street, that is, premises that are not specifically described. The land in the street was expressly included in the deed to the mortgagor. It was not expressly included in the mortgage.

The petitioner argues that the insertion of the provision referred to makes the mortgage cover the land in the street although it is not contained in the specific description and it cites and relies upon *Bernstein* v. *Nealis,* 144 N. Y. 347. But that case cannot aid the petitioner. It plainly shows what the proper rule is, namely, that where the description in a conveyance is ambiguous or imperfect then a general provision such as the one in question will be given effect and the parties will be deemed to have intended to convey what the general description would indicate. To the same effect is *Grandin* v. *Hernandez,* 29 Hun, 399, and *Jackson* v. *Barringer,* 15 Johns. 471. Where, however,

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there is no ambiguity or imperfection in the description, the specific description will control and no property will be deemed to pass under a conveyance by reason of any such general language; all that passes is what is specifically described. *Jones* v. *Smith*, 73 N. Y. 205; *Thayer* v. *Finton*, 108 id. 394.

The description in the mortgage here in question clearly brings it within the cases last cited. Here there is no ambiguity and no imperfection in the description. The descriptions of the parcels are specific and give the metes and bounds accurately. The addition of the words, "being the same premises" conveyed to the mortgagor, add nothing. No additional property passes under this clause. The land in the street admittedly does not pass under the specific descriptions and hence is not included in the property covered by the mortgage. As was pointed out in *Thayer* v. *Finton*, 108 N. Y. 394, 398, the mortgage "does not profess to transfer *all* of the land conveyed" to the mortgagor, "but it simply attempts to give additional particulars as to the property actually described and which, so far as they are given, are correctly stated."

While the intention of the parties is to be considered, it is settled that nothing will pass by a conveyance except what is described in it, no matter what the intention of the parties may have been. *Coleman* v. *Manhattan Beach Imp. Co.*, 94 N. Y. 229, 232. And as stated in the *Thayer* case (p. 398): "By the express language of the description the parties have set visible and known limits to the land intended to be conveyed, and it is not the province of construction to enlarge this description and embrace within it other lands not mentioned."

The suggestion of the petitioner's counsel that the mortgage covers the same property that was conveyed by the deed because it is a purchase money mortgage

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cannot prevail. A purchase money mortgage may or may not cover the same premises as the deed. The question remains in each case whether the purchase money mortgage does cover all the property conveyed by the deed. Under the authorities it seems plain that the mortgage in this case did not cover all the property conveyed and so *DeGarmo* v. *Phelps*, 176 N. Y. 455, has no application. The application of the petitioner is, therefore, denied.

Application denied.

CATHERINE MUNDAY, Plaintiff, *v.* NASSAU ELECTRIC RAILROAD COMPANY, Defendant.

(Supreme Court, Kings Trial Term, February, 1917.)

Verdict — when, should be set aside — difference between trial judge and jury as to verdict — evidence — motions and orders — Code Civ. Pro. § 999.

There being no standard by which to determine the question, a verdict should rarely be set aside, and should not merely because of a difference between the trial judge and the jury as to what the verdict should be.

The provision of section 999 of the Code of Civil Procedure that a verdict may be set aside when "contrary to evidence" is inclusive of all grounds upon which such action may be taken.

Where in an action for personal injuries plaintiff was not entitled to recover if the accident happened as testified to by defendant's witnesses, and plaintiff was the only witness on her side as to how it occurred, and none of the witnesses is discredited, a verdict in favor of plaintiff is not palpably wrong and justice does not require that it be set aside.

MOTION to set aside a verdict.

George D. Yeomans, for motion.

Aaron Benjamin, opposed.

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CROPSEY, J. The plaintiff has had a verdict. A motion to set it aside was made on the ground that it was contrary to the evidence. Plaintiff was the only witness on her side as to the manner in which the accident occurred. The defendant called two passengers besides the crew of the car. If the accident occurred in the manner in which these witnesses said it did the plaintiff could not recover. If it happened the way the plaintiff said it did then the verdict was proper. The jury believed the plaintiff. Had the court been the decider of the facts it would have found a verdict for the defendant. But is that a sufficient ground for setting the verdict aside? From the reading of some of the decisions one would necessarily think that where the court did not agree with the jury's finding the verdict should be set aside. There can seem to be no other basis for decisions such as that in *McManus* v. *Davitt*, 94 App. Div. 481, and others that could be cited. In those an appellate court has set aside verdicts merely on printed records because in their opinion the character of the plaintiff who was the only witness to his claim and of the employee of the defendant who was the only witness opposed were equally good, and from this the court decides that the jury should not have disbelieved defendant's employee. These cases entirely overlook and disregard the personal equation, that is, the appearance and manner of testifying of the different witnesses. It cannot be possible that the correct and proper rule is that the verdict of the jury should be set aside just because the trial court would have decided differently, and much less true must this be in the case of an appellate court which does not see or hear the witnesses. Such a rule would work a practical nullification of our jury system. If no verdict could stand except one with

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which the court agreed there would be no sense in having the jury at all. It would be far better to eliminate them and make the judge the trier of the facts, for that would be the ultimate effect under such a rule. Such a holding would also render absurd the rule that prohibits a judge from expressing his opinion on the facts on jury trials. If the jury had to find in accordance with the judge's opinion in order to have their verdict stand it must follow that it would be proper for the judge to let the jury have his views before they passed on the facts.

Such a rule is not in accordance with our practice nor with the theory of our law. Jury trials have been preserved for a real purpose and not merely as a matter of form. Their verdicts should be final except in rare instances. The mere fact that the trial justice does not agree with the jury does not justify the setting aside of the verdict. The real logical rule should be that verdicts could be set aside only when they were not rational. Chamberlayne Ev. §§ 307, 308; *Metropolitan R. Co.* v. *Wright,* L. R. (11 App. Cas.) 152. But the courts have gotten away from this rule in what is sometimes called " the interests of justice." It is not, however, necessarily in the interests of justice for the trial judge to set aside a verdict just because he would have found otherwise. It does not follow that his conclusion is the correct one. While the experience of the judge might make it more probable that in the average case he would decide the questions of fact more nearly in conformity to the truth than sometimes is done by juries, the reverse may be equally true, namely, that in some cases at least the jury may be better fitted to determine the truth of an issue than the trial court.

The authorities and reason alike agree that the mere

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difference of judgment as to what the verdict should be between the jury and the judge does not justify setting a verdict aside. *Grogan* v. *Brooklyn Heights R. R. Co.*, 107 App. Div. 254–256; *Reeve* v. *Dennett*, 137 Mass. 315–318. The reason why verdicts should be set aside only in rare instances is stated in *McDonald* v. *Metropolitan St. R. Co.*, 167 N. Y. 66, 69: "There is no standard by which to determine when a verdict may be thus set aside."

The only provision for setting aside verdicts is found in section 999 of the Civil Code. That provides that such action may be taken when the verdict is "contrary to the evidence." As this section contains the only provision it is inclusive of all the grounds upon which such action may be taken. *Jarchover* v. *Dry Dock, E. B. & B. R. R. Co.*, 54 App. Div. 238–240. The disposition seems to have been to give this phrase a broad meaning, with the evident purpose of keeping a control over the jury's verdict. With this disposition this court is not in sympathy. It believes that verdicts should be set aside only in exceptional situations, and there is ample authority in support of this view. Where reasonable men might differ as to the result that should be reached the verdict cannot properly be set aside. *Von der Born* v. *Schultz*, 104 App. Div. 94. As was well said in *Cunningham* v. *Magoun*, 18 Pick. 13: "Where the question is purely matter of fact, where there is evidence for the minds of the jury actually and fairly to weigh and balance, where presumptions are to be raised and inferences drawn, and the jury may be presumed fairly to have exercised their judgment, a court will not feel at liberty to set a verdict aside, although upon the same evidence they would have decided the other way." There must be more than a difference of opinion as to what the ver-

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dict should be. It must be palpably wrong, that is, it must have been impossible to reach it upon any fair consideration of the evidence. *Jarchover* v. *Dry Dock, E. B. & B. R. R. Co.*, 54 App. Div. 238–240. It must indicate that the jury were influenced by prejudice, passion, or other improper motive. *Layman* v. *Anderson & Co.*, 4 App. Div. 124–127. Where there is a fair conflict in the proof and the credibility of the witnesses is to be determined the jury is supreme and its verdict should not be overturned. A verdict should not be set aside unless "the ends of justice would not be met by allowing it to stand." *Cox* v. *Halloran*, 82 App. Div. 639–640.

Applying these principles this motion is easily disposed of. While the trial court would not have rendered the verdict that was found, it knows that the jury was composed of men of intelligence and force of character, that there was nothing to arouse their passions or prejudices, that the plaintiff's evidence, if believed, justified the verdict that was rendered, and that the jurors have believed the plaintiff and not the witnesses called by the defendant. The verdict is not palpably wrong and justice does not require it to be set aside.

Should this case reach the appellate court it is not possible now (the testimony not having been transcribed) to know what impression it would make when it was read in cold type. But any lawyer who has had any experience in the trial of cases knows that often the witness who on the trial seems to be unreliable and untrustworthy appears to make the best showing when his personality is eliminated and type takes its place, while the reverse is often true of witnesses who are manifestly truthful and unquestionably honest. The appearance and the manner of the witnesses sometimes

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more than what they say determine their credibility. This often is not reflected in the printed record. It cannot be. To decide merely on a reading of testimony that a verdict is contrary to the evidence (where there is a conflict in it) and so should be set aside would seem to be as likely to result in injustice as in anything else. The credibility of witnesses can seldom be so determined, but as appellate courts do make such decisions frequently it is fair and proper to state here that the plaintiff in the case at bar gave her testimony in a straightforward, frank and convincing manner and appeared to be truthful and honest, that there was nothing improbable in her story and that she was not discredited, and the same should be said of defendant's witnesses. The motion is denied.

Motion denied.

HICKS BEACH COMPANY, Plaintiff, *v.* CARMAN FROST, JR., and Others, Defendants.

(Supreme Court, Nassau Special Term, February, 1917.)

Referee — when motion to vacate and set aside order of reference granted — partition — motions and orders — rule 66 of General Rules of Practice — Code Civ. Pro. § 1012.

The provisions of section 1012 of the Code of Civil Procedure and rule 66 of the General Rules of Practice are mandatory, and where one of the defendants in an action for the partition of real estate is an infant an order of reference to hear and determine entered upon a stipulation designating the referee is illegal and void.

While a motion to vacate and set aside the order of reference will be granted that part of the motion which asks for the appointment of another referee to be selected by the court must be denied.

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MOTION to vacate and set aside an order of reference to hear and determine the issues in an action for partition of real estate, and that the issues be referred for hearing and determination to another referee.

James P. Niemann and Neil H. Vandewater, for the motion.

Eph A. Karelsen, William M. K. Olcott and C. L. Russell, opposed.

SCUDDER, J. The motion is made in behalf of certain defendants who have not heretofore appeared in the action, but who were and are in default by reason of their failure to appear or answer.

They appear specially for the purpose of making this motion and contend that the order of reference which they seek to set aside was made in violation of section 1012 of the Code of Civil Procedure and rule 66 of the General Rules of Practice in that the referee was not designated by the court, but was appointed pursuant to a stipulation between parties who had appeared in the action.

The order of reference, omitting formal parts, reads as follows:

" The above entitled action having duly come on for trial before me at a special term for trials, on the 27th day of November, 1916, and on hearing Eph A. Karelsen, Attorney for the plaintiff herein; and on reading and filing the stipulation dated November 23, 1916, signed by the respective attorneys for all the parties appearing in this action except Edwin C. Wright, guardian *ad litem* for Marian Frost, infant, who appeared in Court and offered no opposition, and on all the proceedings and papers filed herein, it is

" Ordered that all the issues in the above entitled

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action be and they hereby are referred to Charles S. Noyes, Esq., as referee to hear and determine the same."

The stipulation recited in the order was to the following effect: "It is hereby stipulated and agreed that the issues in the above entitled action be and they are hereby referred to Charles S. Noyes, Esq. as referee to hear and determine the same, and that an order to that effect may be entered by any of the parties without notice."

The form of the order and stipulation clearly indicates that they were drawn with reference to sections 1011 and 1012 of the Code of Civil Procedure.

The action was of such a character that an order of reference to hear and determine the issues raised by the pleadings could not have been made except by the consent of the parties. Where an action is not referable without the consent of the parties, a consent to an order of reference to a particular referee will not justify the granting of an order appointing another referee. *Newman* v. *Benedict,* 121 N. Y. Supp. 921; *Preston* v. *Morrow,* 66 N. Y. 452.

The stipulation in the present case designated the referee, and the court was without power to designate a different referee in so far as the parties who entered into the stipulation were concerned.

Section 1012 of the Code of Civil Procedure, among other things, provides that "a reference shall not be made, of course, upon the consent of the parties, in an action * * * wherein a defendant, to be affected by the result of the trial, is an infant," and in such a case, "where the parties consent to a reference, the court may, in its discretion, grant or refuse a reference; and, where a reference is granted, the court must designate the referee."

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It seems to me that the order of reference in this case clearly violates these provisions of section 1012.

There is an infant defendant; the action being one for partition the infant's rights would be affected by the result of the trial; the stipulation of the parties consenting to the reference designates the referee; the order of reference recites that it is made upon the stipulation and appoints the referee which it designated.

It also seems to me that there is ground for holding that the order of reference in this case violates rule 66 of the General Rules of Practice.

Rule 66 was evidently drawn with reference to Code of Civil Procedure, section 1545. See *Levine* v. *Goldsmith*, 71 App. Div. 204, 208; *Fairweather* v. *Burling*, 181 N. Y. 117, 119.

That section provides for a reference to ascertain title in actions for partition in the following language: "Where a defendant has made default in appearing or pleading, or where a party is an infant, the court must ascertain the rights, shares and interests of the several parties to the property by a reference or otherwise before interlocutory judgment is rendered in the action."

The last sentence of rule 66 reads as follows: "Such referee and the referee appointed to sell shall in all cases be selected by the court."

Construing this sentence of the rule with reference to section 1545 and in such a manner as to make it applicable to the facts of this case, the rule directs that a referee appointed to ascertain the rights, shares and interests of the several parties to the property in an action for partition shall, "in all cases" (which would include both the cases stated in section 1545, namely, where a defendant has made default in

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appearing or pleading, and where a party is an infant) be selected by the court.

The parties by whom the present motion is made are defendants who have defaulted in appearing. Their rights and interests in the property sought to be partitioned have been determined by a referee who was not selected by the court but who was designated by a stipulation between the parties who had appeared in the action.

Section 1011 of the Code of Civil Procedure in so far as it provides that a reference shall be made to a referee named by the stipulation of the parties should be construed to be limited to cases in which the determination of the referee affects only the rights and interests of the parties by whom the stipulation was made. To hold in a case like the present that some of the parties to an action can select by means of a stipulation between themselves a referee who may determine not only the rights of such parties in the subject matter of the action but also the rights of other parties therein who either cannot or do not consent to have their rights determined by such referee affronts the elementary notion in the administration of justice that a judicial tribunal shall be impartial and not the creature of parties to one side of the controversy.

The provisions of section 1012 of the Code of Civil Procedure and rule 66 of the General Rules of Practice to which I have above adverted are mandatory, and since the order of reference violates them, as above pointed out, it must be held to be illegal and void notwithstanding that the impartiality and fairness of the referee's determination is not impugned and that great hardship will result from the setting aside of the order.

So far as the motion is made for a new reference before another referee to be selected by the court it

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cannot be granted. The case has not been legally tried by the referee and therefore this motion cannot be regarded as an application for a new trial of an action tried by a referee who was designated by the parties within the meaning of section 1011 of the Code of Civil Procedure.

Motion granted setting aside order of reference and subsequent proceedings, and in all other respects denied. No costs.

Ordered accordingly.

Matter of the Application of THE CITY OF NEW YORK, Relative to Acquiring Title, etc., for the Opening and Extending of Firth Avenue, etc.

(Supreme Court, Queens Special Term, February, 1917.)

Condemnation proceedings — proceeding to acquire land for street uses — when application for appointment of commissioners of estimate and assessment denied — title — Greater New York charter, § 992.

Where the city of New York, in disregard of the limitation of the resolution of the board of estimate and apportionment authorizing a street opening proceeding and of the clear, express and unambiguous wording of section 992 of the Greater New York charter, as amended in 1910, initiates a proceeding to acquire lands for street uses which have already been acquired by conveyance, the application for the appointment of commissioners of estimate and of assessment will be denied on the objection of property owners whose predecessors in title had conveyed to the city all of the real property within the lines of the street in front of the lands owned by them.

The provisions of said section 992 are for the benefit of both the land owner and of the city to save costs and expense in a street opening proceeding.

The court may not question the equity or propriety of the area of assessment as fixed by the board of estimate and apportionment in pursuance of its delegated legislative power.

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APPLICATION by city of New York for the appointment of commissioners of estimate and commissioners of assessment for acquiring the fee of real property.

Lamar Hardy, corporation counsel (Joel J. Squier and Walter C. Sheppard, of counsel), for City of New York.

Henry A. Ingraham, for Charles Simonson, owner.

Gregg & Franks, for William B. Cating, owner.

GARRETSON, J. This is an application by the city for the appointment of commissioners of estimate and commissioners of assessment in a proceeding having for its purpose the acquiring of the fee of the real property, within the limits of Firth avenue from Grand street to Juniper avenue in the second ward of the borough of Queens, for street uses.

Although it is set forth in the title of the city's petition that it is intended to relate to such real property as "has not been theretofore acquired," it is no where so limited in the body of the petition, while, on the other hand, it does appear, from the particular description therein contained and the map thereto attached, that all of the land within the avenue is sought to be taken.

Objection is made to the granting of the application by Charles Simonson and William B. Cating, owners in severalty of all the real property abutting either side of the avenue from Grand street to Caldwell avenue, a distance of two blocks, who ask that the application be denied for the reason that prior to the institution of this proceeding their common predecessors in title had conveyed in fee to the city, and the city had accepted the conveyance of all of the real

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property within the lines of the avenue in front of the lands owned by them as aforesaid. That such conveyance had been made and accepted by the city is not disputed, but is admitted to be the fact.

The said owners base their objections mainly upon the provisions of section 992 of the charter of the city as amended by chapter 548 of the Laws of 1910, wherein it is stated, among other things, that such conveyance being made, accepted and filed, " thereupon the city of New York shall become vested with the title to said lands to the same effect and extent as if they had been acquired by a proceeding taken for the opening of that portion of said street; after the making and acceptance of such conveyances, no proceedings to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the streets so conveyed, and extending to the center of the block on either side of such portion of said street so conveyed, be chargeable with any portion of the expense of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings, as aforesaid."

It is alleged by the objectors, not denied, but conceded, by the city, that there are no buildings within the lines of the avenue, and consequently no awards for buildings would be required to be made.

The board of estimate and apportionment authorized this proceeding by resolution adopted October 13, 1916, and thereby directed that it be instituted to acquire title to the lands within the avenue for the use of the public " wherever the same has not been heretofore acquired," thus recognizing the fact, at least impliedly, that some part or parts of such lands might already be vested in the city, and in terms excluding

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such already acquired lands from the proceeding, and to that extent limiting its scope and purpose.

The provisions of the section cited are for the benefit of both the land owner and the city, so that the former may cede his land in a street proposed to be opened "without compensation and before the appointment of commissioners," and that he, the city, and others interested may to that extent save cost and expense in a proceeding, if instituted, or entirely, if the cession obviates the need of any proceeding. The realization of its purpose should be encouraged and not hampered.

The charter, section 994, as amended by chapter 658 of the Laws of 1906, relates to the acquisition of lands by agreement with the owners for compensation, and has no relevancy to the situation presented on this application.

It is presumed that after the adoption by the board of estimate and apportionment of the resolution of October 13, 1916, and before instituting this proceeding, the corporation counsel knew what lands in Firth avenue had theretofore been acquired by the city by conveyance, and that he had caused the deeds therefor to be recorded in the office of the county clerk, and filed with the comptroller of the city, as was his duty. § 992, *supra*.

The infirmity of the petition is, that it is sought thereby to initiate a proceeding to acquire lands for street uses which have already been acquired by conveyance, in disregard of the limitation of the resolution authorizing it, and of the express prohibition of said section 992.

The corporation counsel urges that the use in the title of the petition of the words "wherever the same has not been heretofore acquired," in effect excludes from the proceeding all the lands within the avenue

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already conveyed to the city, and that therefore the opposition of the objectors is without force. As hereinabove stated, the quoted words are from the resolution of the board and are used therein to indicate the lands as to which the proceeding is not to be taken; while the particular description in the body of the petition of the lands affected by this proceeding and the map annexed, show that all of the lands in Firth avenue are comprehended. Such being the fact, the use of those words in the title is meaningless, contradictory and misleading.

The prohibitory words of section 992 of the charter are clear and unambiguous and to attempt to continue them would be supererogatory.

The conclusion reached herein will not be found to be in conflict with the case of *Matter of City of New York* (*Avenue L.*), 107 App. Div. 581, which differs from this application on the facts, it appearing therein "that the appellant's deed was never accepted while every inference points to the contrary."

The board of estimate and apportionment having fixed, by its resolutions, the area of assessment, in pursuance of its delegated legislative power, the court may not question the equity or propriety thereof. *Ellwood* v. *City of Rochester,* 122 N. Y. 229; *People ex rel. Hagerty* v. *McClellan,* 107 App. Div. 272; *Matter of City of New York* (225*th Street*), 150 id. 223; *Matter of 33d St. & Case St.*, N. Y. L. J., Dec. 7, 1915.

I find no occasion for legal criticism of the resolution of the board of estimate and apportionment which by its terms authorizes and directs a proper proceeding to be taken to acquire the lands for the opening of Firth avenue, not theretofore acquired by the city. If such a proceeding shall be instituted the objector Cating will be interested to the extent at least of a probable assessment on his lands lying beyond the center

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line of the block between Firth avenue and Bittman street. The matter of an assessment on the abutting lands of each objector, to the extent of their due and fair proportion of the awards that may be made for buildings, will presumably not then be involved therein.

For the foregoing reasons, the application is denied, with ten dollars costs to each of the objecting land owners.

Application denied.

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Plaintiff, *v.* ANSEL Y. FOX, Defendant.*

(Supreme Court, Albany Special Term, February, 1917.)

Contempt — disobedience of injunction order — city of Elmira.

Where a contempt proceeding, to punish defendant for violating an injunction order which restrained him as an individual from operating a bus line through city streets until he had authority from the city and a certificate from the public service commission, was discontinued upon his representations that he had in good faith complied with the injunction and had abandoned the use of his horse-drawn vehicle in the manner complained of and was no longer engaged in the business of transporting passengers through said streets, a further application to punish him for a violation of said injunction will be denied, with leave to renew, where it appears that the title to his horses and wagon had been transferred to others and that he was simply employed by them on a salary to act as driver.

APPLICATION for an order to show cause why defendant should not be punished for a contempt of court.

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* See 96 Misc. Rep. 283.—[REPR.

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Ledyard P. Hale counsel to Public Service Commission, Second District, for plaintiff.

Herman I. Desky, for defendant.

RUDD, J. Under an order to show cause the defendant is called upon to show why he should not be punished for a contempt of court for his failure to obey the injunction order granted in this matter and entered in the clerk's office of Albany county on the 13th day of July, 1916, and why he should not be fined and committed to jail for such contempt, and for such other and further relief in addition to costs as the court may determine to be just.

The order above referred to, entered July 13, 1916, was made after a hearing, at which the defendant was represented by counsel, and the court on that hearing found:

First. That the defendant is a common carrier.

Second. That as such common carrier he operated a bus line, stage route or vehicle upon the streets of Elmira for a rate of fare less than fifteen cents per passenger within said city, and that such vehicle was operated in competition with the Elmira Water, Light and Railroad Company, an electrical street railway corporation which is required to obtain the consent of the local authorities to operate over the streets of the city of Elmira, without having obtained the consent of the local authorities of the city and a certificate of convenience and necessity from the public service commission, second district, as required by law.

Upon these findings the order made by the court decreed that the defendant be enjoined and restrained from operating upon the streets of the city of Elmira either a bus line, stage route or vehicle, carrying passengers for hire, without the consent of the local

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authorities of the city of Elmira and a certificate of public convenience and necessity from the public service commission, together with fifty dollars costs and disbursements against the defendant Ansel Y. Fox.

After the entry and service of the order aforesaid upon the defendant it came to the knowledge of the public service commission, second district, that the defendant was disregarding the order and therefore an order to show cause why he should not be punished for contempt for disobedience of the injunction order was obtained.

The defendant filed an affidavit that he had in good faith complied with the injunction and had abandoned the use of the conveyance in the manner complained of, and was no longer employed in the business of transporting persons through the streets of Elmira.

Such representations were made by the defendant's counsel that the plaintiff was induced to consent to the entry of an order discontinuing the proceeding to punish the defendant for a contempt.

In making the order of injunction against the defendant the court held that the defendant in the operation of the horse-drawn vehicle, conveying passengers, even if they were the employees and only the employees of a certain manufacturing plant in Elmira, which employees had formed, under legal advice, a "Mutual Transportation Club" and that only members thereof rode in the vehicle, was not permitted "to ignore the requirement of the statute, which, for well considered and well understood reasons, must and should call upon this defendant to apply for and obtain from the local authorities of the city of Elmira permission to use its streets."

"The local authorities are given by law the right to

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impose restrictions and conditions upon the use of city streets by such a vehicle, which constitutes in reality a bus line."

And further the court held that the defendant should have a certificate of public convenience and necessity.

From the order made no appeal was taken and it was understood that the defendant recognized the force of the injunction order and had discontinued the running of the vehicle.

Upon the application now made to punish the defendant for contempt an entirely different situation is developed.

From affidavits filed it seems that it is claimed that defendant Fox conveyed by a bill of sale the wagon, team and harness which he had formerly used in the transporting of the employees of the Morrow Manufacturing Company to the "Co-operative Bus Association consisting of about seventy-five employees of the Morrow Manufacturing Company of Elmira, N. Y." and that defendant "is employed as driver of said bus and team at a salary paid him by said Association;" that the defendant does not conduct a public bus, does not collect any fares, does not take on passengers other than the members of the association, each of whom has a number and responds to a roll call, and that the defendant does not and cannot allow the public to ride upon the bus either free or for hire or upon the payment of a fare; that the bill of sale conveying the wagon, horses and harness contains the conditions of said sale.

The affidavit of one of the employees of the Morrow Manufacturing Company states that each member of the Co-operative Bus Association is furnished with a button containing a number which corresponds to the number contained on a roll call, which roll is called

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prior to each trip to and from the Morrow Manufacturing Company's plant; that the defendant Fox is employed as a driver at a salary; that the bus is only operated for the benefit of the members of the association, does not take on other passengers or collect fares from the public or persons offering themselves as passengers for hire.

Affidavits are presented upon the part of the plaintiff to the effect that the defendant has been frequently seen driving the horses drawing a vehicle through the streets of Elmira since the 22d day of November, 1916, and that the defendant has been seen frequently driving the horses drawing this vehicle more or less filled with passengers on different streets in the city of Elmira.

The defendant states in his affidavit that he has not run the vehicle through the streets carrying passengers since the discontinuance of the former proceedings for contempt until after he had sold and conveyed the property to the members of the association.

We are now asked to punish the defendant for contempt in violating an order which restrained him as an individual from operating a bus line through the streets of Elmira.

The defendant's contention, non-supported by affidavits, is that he is not conducting a bus line, but as a man he is employed driving a team of horses, which do not belong to him, which draw a vehicle, which is not his property, both horses and vehicle, with the harness used, having been conveyed to certain individuals who are employees of the Morrow Manufacturing Company plant; and that the owners of the team and the wagon are using it, with the defendant as their employee, in going back and forth, morning and evening, to and from their work and homes.

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Counsel for the plaintiff says, the same horses, the same wagon and the same driver, and that the driver is doing that which the order heretofore entered restrains him from doing and that therefore he is in contempt.

The injunction order made was not addressed to him because he was driving a team of horses, but it was addressed to him because as owner of the horses and the wagon and the whole outfit he was using the streets of Elmira for the operation of a bus line or such a conveyance which should not be operated until the man operating it had authority from the city of Elmira and a certificate from the public service commission; that is not the situation which confronts us now.

If the affidavits are true, and the bill of sale has been executed and the title to the horses and the wagon has been conveyed to other people, and the defendant is simply driving the team of horses on a salary for them, if this is a bus line, the defendant is not conducting it but the owners of the establishment are conducting it and employing the defendant to do a certain part of the work.

It has been suggested that it is a mere makeshift, that the alleged conveyance is an attempt to evade the law. It may be. Such attempts have been heretofore made.

This court is not prepared to make an order sending the defendant to jail for violating the injunction order, in view of the fact that it may be that he is not the owner of the bus line or of the horses and wagon and outfit which goes to make up the line, and that he is not operating it. It may be that the outfit is the property of certain men who have bought it.

There is a way to find out definitely these facts.

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They cannot be ascertained to the satisfaction at least of this court upon these affidavits.

The bill of sale which is referred to in the affidavit of the defendant as being made a part of the affidavit does not accompany it. There seems to be an uncertainty as to even the date of the bill of sale.

A vehicle loaded with passengers going through the streets of Elmira is no less a menace to the people on the highway, and even to those in the vehicle, when it is owned by the individual employees of a manufacturing company than it was when it was owned by the defendant, and if it is, in whatever ownership it may be, operated as it is, within the provisions of the law with reference to certificates of public convenience and necessity and consent of the municipal authorities of the city of Elmira, that can be determined by an inquiry by the public service commission and relief can be had, but it seems very doubtful whether this court would be justified in punishing the defendant for contempt upon the state of facts which have been developed.

The motion is therefore denied, without costs, and with leave to renew the same, if the plaintiff is so advised, upon other papers or after a hearing had by the public service commission.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK on the Relation of MAURIS ORTENBERG, Relator, *v.* THE UNIVERSITY OF THE STATE OF NEW YORK, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of THOMAS J. BYRNES, Relator, *v.* THE UNIVERSITY OF THE STATE OF NEW YORK, Respondent.

(Supreme Court, Albany Special Term, February, 1917.)

Mandamus — when writ of, denied — Education Law, §§ 47, 48 — Regents of the University of New York — when application to compel university to grant relators a rating upon examination papers denied.

Information having been received by the Regents of the University during the months of February, March and April, 1916, that the principal of an educational institution incorporated by the regents had furnished its students with false certificates of attendance and had permitted them to take examinations without having regularly attended upon instruction as required by the regents' rules, it appeared, upon investigation, that many of said students, including relators, did not attend upon instruction at the times and under the conditions required for attendance at registered secondary schools and that much of their instruction was given in violation of said rules and, as a result of the investigation, the registration of the institution as a member of the university was canceled by the regents July 1, 1916. *Held,* that as under sections 47 and 48 of the Education Law and the regents' rules the entire control and supervision of examinations conducted at said institution are conferred upon the Regents of the University and rest entirely within their discretion, relators' applications for peremptory writs of mandamus to compel the university to grant them a rating upon their examination papers of January, 1916, will be denied, though it appears that relators did not participate in the fraud of the principal of the institution.

APPLICATIONS for peremptory writs of mandamus.

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Henry C. Quinby, for relators.

Frank B. Gilbert, for respondent.

CHESTER, J. The relator in each of these proceedings seeks a peremptory writ of mandamus commanding the respondent to grant a rating upon his examination papers forwarded to the respondent in January last and to issue and deliver to him its report or certificate thereon which shall show to what credit or rating he is entitled under the rules and regulations of the University.

The examination which the relators took was a regents' examination conducted at the Westerleigh Collegiate Institute in January, 1916. That institution was incorporated as an educational institution by the Regents of the University on December 12, 1894. By reason of information received by the regents during the months of February, March and April of 1916, that the principal of such institute had furnished its students with false certificates of attendance and had permitted them to take examinations conducted at such institute without having regularly attended upon instruction there as required by the regents' rules, the regents investigated the matter and upon that investigation it appeared that many of the students, including the relators, did not attend upon instruction at the institute at the times and under the conditions required for attendance at registered secondary schools and that much of the instruction was given in the evening, on Saturday afternoons and on Sundays in violation of rules established by the regents for the conduct and giving of instruction in such institutions. As a result of such investigation, which revealed many other irregularities with respect to examinations at such institute, its registration as a member of the Univer-

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sity was canceled by the regents on July 1, 1916. The principal of the institute was thereafter indicted by the grand jury of Richmond county and is now awaiting trial for violation of section 67 of the Education Law (Laws of 1910, chap. 140) for unlawful acts with respect to the January, 1916, examinations conducted at such institute, which were the examinations these relators seek to compel the respondent to give them a rating upon. The regents' rule (§ 337, subd. b) with respect to examinations requires regular attendance by pupils at a recognized academic school of this state, with a minimum time requirement for the subject studied, as a prerequisite to taking the regents' examination. The pupil is required also to make a statement upon his answer paper as to the number of weeks he has regularly studied the subject and the number of his recitations a week. Id. § 336, subd. b. These relators each made a statement upon his paper in this respect which the respondent claims was misleading and false.

The respondent also made an investigation with respect to the applications of these relators for a rating in addition to the general investigation concerning the alleged frauds committed at the school in question with respect to examinations, and thereafter voted to direct the department not to rate or give credit for any answer papers of the students of this institute submitted upon the examination in January, 1916.

It is a complete answer to this application to compel such rating to say that the entire control and supervision of the examinations in question are conferred by law upon the Regents of the University and rest entirely within their discretion. Regents' examinations are controlled by sections 47 and 48 of the Education Law and by such rules under the law as the

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regents may properly make. Section 47 of that law provides that the regents "may establish examinations as to attainments in learning, and may award and confer suitable certificates, diplomas and degrees on persons who *satisfactorily* meet the requirements prescribed." Section 48 of that law provides that "The regents shall establish in the secondary institutions of the university, examinations in studies furnishing a suitable standard of graduation therefrom and of admission to colleges, and certificates or diplomas shall be conferred by the regents on students who satisfactorily pass such examinations."

Under the statute therefore it is clear that no certificates are required to be issued until the applicant has passed an examination satisfactorily to the regents. The respondent asserts in these cases, after a careful and painstaking examination of the entire subject, that these applicants have not satisfactorily to the regents passed the examinations in the subjects taken by them. While it is undoubtedly true that it does not appear that the relators have themselves participated in the frauds charged against the principal of the institute, yet there was sufficient in the misleading statements contained in their answer papers, entirely apart from the frauds charged against the institution where they studied, to justify the position taken by the regents in respect to withholding a rating upon the examination taken by them.

It does not appear that the respondent has refused or neglected to perform any duty imposed upon it by law. On the contrary, its course has been in obedience to and wholly within the law. For these reasons the application must be denied.

Application denied.

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HUDSON NAVIGATION COMPANY, Plaintiff, v. UNION TRUST COMPANY of Albany, N. Y., PETER McCARTHY, FRANK McCARTHY, ROBERT McCARTHY, ALFRED McCARTHY and CHARLES M. ENGLIS, Defendants.

(Supreme Court, Albany Trial Term, February, 1917.)

Mortgages — action for construction of trust mortgage — liens — pleading.

A trust mortgage given by a navigation company upon one of its vessels then in course of construction considered, in connection with the bonds and the correspondence between the parties, to have been intended to cover the mortgaged property as a completed vessel.

Where by the terms of the mortgage the mortgagor could withdraw, from the sinking fund, bonds deposited as collateral "to pay for new or additional vessels" or "extensions of or additions to or improvements of a permanent nature" to vessels, providing the cost should be twenty per cent above amount of bonds withdrawn, the mortgagor was not authorized to withdraw bonds to apply on the cost of one of the mortgaged vessels long after it was completed and paid for, as such course would exhaust the security coming from the sinking fund without giving to the bondholders security of any kind in lieu thereof.

As the trustee by the terms of the mortgage was permitted to pay reasonable compensation to an attorney which would constitute a lien upon the property, it was entitled to an allowance of counsel fees in an action brought by the mortgagor to obtain a construction of the mortgage.

ACTION for the purpose of obtaining a construction by the court of article VIII of a trust mortgage.

Barber, Watson & Gibboney, for plaintiff.

Arthur L. Andrews, for defendant Union Trust Company of Albany, N. Y.

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Thomas S. Fagan, for defendants McCarthy.

Merrill, Rogers & Terry, for defendant Charles M. Englis.

RUDD, J. This action is brought for the purpose of obtaining a construction by the court of article VIII of a trust mortgage made by the Hudson Navigation Company to the Union Trust Company of Albany, N. Y., under date of February 1, 1908.

The Hudson Navigation Company was the mortgagor and a construction of article VIII will answer the question which is here presented as to whether the expenditures made by the mortgagor for the completion of the steamer *Berkshire* constitute a legal ground for the withdrawal by the plaintiff of bonds or moneys from the sinking and replacement fund created by article VIII of the trust mortgage.

The mortgage bears date February 1, 1908, and was acknowledged February 21, 1908.

Some time prior to the last mentioned date the Hudson Navigation Company began the construction of two steamboats then known as the *Princeton* and the *Trojan*. The *Princeton* was afterward known as the *Berkshire*, and in the consideration of the question this steamer will hereafter in this memorandum be referred to as the *Berkshire*.

The real issue in this litigation seems to be quite simple. It is really confined to the determination as to whether or not the *Berkshire* was covered by the trust mortgage as a completed steamer.

When the mortgage was acknowledged, February 21, 1908, there had been then expended upon the steamer *Berkshire* $519,674.94. There has since that date been expended $619,525.20, making the aggregate cost of the steamer $1,139,200.14.

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The vessel was completed and delivered to the company on May 1, 1913.

Article VIII of the mortgage held by the Union Trust Company of Anbany, N. Y., as trustee, providing for a sinking fund, reads as follows: "Any or all of the bonds deposited with the Trustee under the provisions of this Article, and any and all interest moneys paid by the Navigation Company to the Trustee, may be used by the Navigation Company and redelivered or returned by the Trustee to the Navigation Company in whole or in part from time to time, upon the written request of the Navigation Company signed by its President and Treasurer and based upon resolutions of its Board of Directors duly adopted, and the bonds so redelivered and the proceeds thereof and such interest moneys shall be used solely to pay or provide for new or additional vessels, or real or personal property, or for extensions of or additions to or improvements of a permanent nature, to or upon the steamboats, barges and other vessels, real estate, wharves, docks, plants or other property of the Company, the actual cost of which new vessels, extensions, additions and improvements shall be at least twenty (20) per cent. in excess of the face value of the bonds so to be redelivered or the interest money so to be returned by the Trustee, and all such new vessels, extensions, additions and improvements shall immediately become and remain subject to the lien of this mortgage as if specifically described herein, and the Navigation Company shall from time to time as may be proper or necessary, execute and deliver to the Trustee supplemental mortgages upon all vessels or other property which shall have been thus acquired, and such supplemental mortgages shall be treated as further and additional security for the payment of all

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bonds issued by said Navigation Company under the provisions of this indenture and shall enure by way of accretion to the benefit and advantage of the said Trustee and its successors in this trust and to the said bondholders."

The portion of article VIII above quoted provides for the redelivery by the trustee to the Hudson Navigation Company of bonds deposited with the trustee upon the written request of the navigation company; "and the bonds so redelivered and the proceeds thereof and such interest moneys shall be used solely to pay or provide for new or additional vessels, or real or personal property, or for extensions of or additions to or improvements of a permanent nature, to or upon the steamboats, barges and other vessels, real estate, wharves, docks, plants or other property of the Company, the actual cost of which new vessels, extensions, additions and improvements shall be at least twenty (20) per cent. in excess of the face value of the bonds so to be redelivered" etc.

Was the sum of $619,525.20 expended upon the steamship *Berkshire* after the 21st of February, 1908, expended for newly acquired property or for betterments or extensions, additions or improvements, as contemplated by article VIII of the mortgage, above cited?

The trust mortgage permitted the Hudson Navigation Company to borrow from the public to the extent of $4,000,000 upon certain securities offered, which would enable the Hudson Navigation Company to refinance the mortgage of the New Jersey Steamboat Company of $1,300,000, and for certain other specific purposes, the nature of which from the records of the Hudson Navigation Company clearly appears.

The company on or about the 1st of January, 1908,

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decided to increase its capital from $4,000,000 to $8,000,000, and it provided for the issuance of twenty-year five per cent gold bonds, " to be secured by a first mortgage on two additional steamships which are being acquired by the company. The two said steamships when completed will be worth approximately $1,500,000."

These steamships included what is now known as the *Berkshire.*

This plan was changed. The company adopted a resolution providing for $4,000,000 worth of six per cent thirty-year bonds, and on the 28th of January, 1908, issued a notice to the security holders of the company. The notice read as follows:

" HUDSON NAVIGATION COMPANY,

" JERSEY CITY, N. J., *January 25th,* 1908.

" *To the Security Holders and Stockholders of Hudson Navigation Company:*

"At a meeting of the Board of Directors of your Company, held on January 16, 1908, at which all the members of the board were present, it was unanimously voted that there should be a new issue of $4,000,000 6% 30-year mortgage bonds of the Company, with suitable sinking fund provisions, the new issue to fund or provide among other things, for all existing or authorized bonds; said new 6% bonds to be secured by a first mortgage on all the property of this Company, except such property as is now subject to a first mortgage given by the New Jersey Steamboat Company, upon the payment of which this proposed new mortgage will be a first mortgage upon all property now owned by the Company.

" Said $4,000,000 of new 6% bonds is intended, among other objects, to fund or provide for the following issues and purposes:

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	"New Bonds.
"1st. To care for an equal amount of outstanding first mortgage 5% New Jersey Steamboat Company bonds, at their maturity in 1921, or sooner if desired	$1,393,000
"2d. Exchange immediately new 6% mortgage bonds for $970,000 face value of Hudson Navigation Company collateral trust 5% bonds dated January 1st, 1903, due 1923.....	970,000
"3d. Substitute new 6% bonds for the proposed issue of $1,000,000 which was to have been secured by mortgage on two new boats under construction, new bonds being better secured with better rate of interest.....	1,000,000
"4th. Use balance to provide for completion of vessels under construction, Citizens Steamboat Company of Troy, bonds, debentures and obligations and other corporate purposes	637,000
"Total bonds to be authorized.....	$4,000,000

"Proper legal steps are now under way for accomplishing the foregoing exchanges and issuing the new securities. Further information may be obtained by application (written or otherwise) at the New York office of the Company, Pier 32 North River, New York city. Very truly yours,

"ABEL I. CULVER,
"President."

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The 3d subdivision of this notice provides for the proposed issue of $1,000,000 which was to have been secured by mortgage on two new boats under construction, new bonds being better secured with better rate of interest.

The "two new boats under construction" include the *Berkshire.*

In the recital of the mortgage under consideration, it says:

"WHEREAS, the Navigation Company desires to make an issue of bonds for the purpose of refunding or providing for all existing issues of bonds or authorized issues of bonds of the Company and for all outstanding bonds which may be secured by mortgage upon any property now owned by the Company, and to provide funds for acquiring or building additional steamboats, barges and other vessels, and for the transaction of its business and the exercise of its corporate rights, privileges and franchises;"

And further:

"The Navigation Company agrees to pay to The Union Trust Company of Albany, N. Y., as trustee, on or before the fifth day of January, 1911, and on or before the fifth day of January in each year thereafter until the maturity of this issue, as a sinking fund for the retirement of bonds of this issue at par and accrued interest on the succeeding first day of February, the sum of $50,000, or the Navigation Company will, in lieu of such payment or any part thereof, deliver to said Trustee in accordance with the provisions and stipulations more specifically set out in the said mortgage or deed of trust, bonds of this issue taken at their par value."

The following provision of the mortgage seems to show that the intention was that the *Berkshire* and the *Trojan* when completed should be secured under the

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mortgage of $4,000,000 or under the mortgage of $1,000,000 previously provided for.

The provision of the mortgage reads as follows:

"And the said Navigation Company covenants and agrees that it will execute and deliver to the Trustee, when and as soon as the said steamboats shall respectively be completed and entitled to a certificate of enrollment, supplemental or additional mortgages sufficient to completely vest said two steamboats in the Trustee, subject to the lien and for the purposes of this mortgage, and said Navigation Company further covenants and agrees that each of said steamboats shall then be free and clear of all other liens or encumbrances whatsoever;

" Provided, However, if the Navigation Company shall deem it necessary to carry out the plan outlined in a certain circular letter of the Navigation Company to its stockholders dated April 30th, 1907, and to place the said steamboats Princeton and Trojan under the lien of the mortgage described in said circular letter, then said Navigation Company shall have the right to carry out said plan and to place said steamboats Princeton and Trojan under said mortgage, and that the execution and delivery of said mortgage on said steamboats Princeton and Trojan described in said circular letter shall not be construed or deemed to be a breach of any covenant herein contained, and the lien of said mortgage shall be prior to the lien of this mortgage on said two steamboats."

On pages 18 and 19 of the mortgage it is provided as follows:

" Of this issue of four thousand (4,000) bonds, three hundred (300) bonds shall be forthwith certified by the Trustee and delivered to the Treasurer of the Navigation Company without further order, and seven hundred (700) bonds shall from time to time, upon

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resolutions of the Board of Directors of the Navigation Company requesting the same, be certified by the Trustee and delivered to the Treasurer of the Navigation Company. The Navigation Company covenants and agrees to use the said one thousand (1,000) bonds, viz., the aforesaid 300 bonds and the aforesaid 700 bonds, either for exchanging said bonds for bond payment certificates issued or to be issued by the Navigation Company under the terms of a circular letter of the Navigation Company to its stockholders, dated April 30, 1907, or to deliver said bonds in place of such bond payment certificates, or if the Company shall deem it necessary to carry out the plan outlined in the said circular letter and to place the steamboats Princeton and Trojan under the lien of the mortgage described in said circular letter, then for exchanging par for par said 1,000 bonds or any part thereof secured by this mortgage for the bonds which may be issued under the mortgage described in said circular letter of April 30th, 1907."

From this provision it certainly appears that 1,000 of the bonds issued under the $4,000,000 mortgage were specifically issued to cover the completion of the *Berkshire* and *Trojan*, having in mind all the time that the mention of the *Princeton* in this mortgage and in the resolution and records means *Berkshire*.

In a letter addressed by the Hudson Navigation Company to the Union Trust Company, dated June 28, 1909, the trust company is asked to issue bonds " for the purpose of providing for the completion of new steamboats now under construction for the use of navigation."

The Union Trust Company issued the bonds apparently in accordance with the request of the Hudson Navigation Company, following the action of the board of directors of the company held March 24, 1908,

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when, on motion made by Mr. McCarthy, the following resolution was unanimously adopted:

"*Resolved,* that The Union Trust Company of Albany, N. Y., Trustee under a certain indenture of trust and mortgage dated February 1st, 1908, made by this Company to said Trust Company to secure an issue of $4,000,000 of six per cent mortgage bonds, be and it is hereby requested to certify from time to time upon order of this Company signed by its President and Secretary, and to deliver to the Treasurer of the Company remaining 700 bonds of the aggregate face value of $700,000 from the 1,000 bonds which the Hudson Navigation Company in said indenture of trust and mortgage covenanted to use for exchanging for bond payment certificates issued under the terms of the Navigation Company's circular letter of April 30th, 1907, and as otherwise provided in said indenture of trust and mortgage."

Other letters were written by the Hudson Navigation Company to the Union Trust Company calling for the issuance of the bonds, and it certainly appears as if the boats under construction, one of which is now known as the *Berkshire,* were as completed vessels intended to be secured by the bonds issued under the mortgage.

No application was made by the Hudson Navigation Company to the Union Trust Company for the withdrawal of the bonds from the sinking fund until about 1913, since which time various withdrawals of bonds have been made.

The *Berkshire* was not newly acquired property. It was not necessary to execute a supplemental or additional mortgage for the boats were covered under the original mortgage of $4,000,000.

The mortgage was evidently issued originally to provide funds for the construction and completion of

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these steamers. The *Berkshire* was but a hull upon which had been expended about $500,000. Still when the mortgage was given the completion of the boat must have been in mind, as evidenced by records and instruments executed and issued.

There is no claim that the Hudson Navigation Company must have the proceeds from the sale of the bonds, for which it has made application for withdrawal from the sinking fund, in order that the company may pay any unpaid claims or demands against the company for the completion of the *Berkshire.*

The steamer *Berkshire* has been for a long time a completed steamer, is fully paid for and in use by the company. It evidently was covered by the original mortgage. As a matter of safety and precaution, and possibly wisely, it was covered by a supplemental mortgage and the bondholders have the security which comes under the mortgage.

To allow the Hudson Navigation Company to withdraw bonds each January from the sinking fund to the amount of $50,000 to apply upon the cost of the *Berkshire,* long since paid, would exhaust the security which comes from the sinking fund without giving to the bondholders any security of any kind in lieu thereof.

The company seems to have complied with the necessary and formal requirements under the mortgage in its application to the Union Trust Company for leave to withdraw the bonds in question. No objection being raised as to the form of the application or to the legality of the same, it would seem that the trust company would have been justified in permitting the withdrawal.

This, however, is not intended as passing upon the questions which the defendant bondholders have here raised as to the alleged illegality of other and

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previous withdrawals, for the reason that in the opinion of the court these questions are not now here involved, although they have been presented by the defendant bondholders in the answer which has been filed by the McCarthys.

It is claimed on their part that when deposits have heretofore been made by the navigation company of bonds for the sinking fund that such bonds have not been purchased or been owned by the navigation company, but on the other hand it appears that the defendant bondholders who are now raising that question, for valuable considerations which they have realized, have heretofore loaned bonds to the company for the purpose of enabling the company to deposit the same with the trust company.

However that may be, the application here is simply in an action brought by the navigation company against the Union Trust Company, the bondholders being allowed to intervene for their interests, asking a construction by the court, so far as the trust company is concerned, as to its duty under the mortgage upon the application now pending for the withdrawal of $50,000 of bonds from the sinking fund.

As has already been indicated, it seems clear that such application is not justified.

The company in completing the *Berkshire* has not acquired additional property, has no other or further security which would protect the bondholders as against the depletion of the sinking fund, and for that reason the complaint must be dismissed, with costs.

The trust company under the terms of the mortgage being permitted to pay reasonable compensation to attorneys which would constitute a lien upon the property, and in accordance with the provisions of the law, is entitled to costs and a reasonable allowance. The

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trust company stands simply as a stakeholder and under the law cannot be put to any unnecessary or unusual expense in the administration of a trust.

The defendant trust company is entitled to a bill of costs as against the plaintiff and to an allowance of $150.

Judgment accordingly.

STEPHEN R. CLEVELAND, Individually and as Commissioner of the Board of Water Works of the City of Watertown, et al., Plaintiffs, *v.* THE CITY OF WATERTOWN, ISAAC R. BREEN, as Mayor, et al., Defendants.

(Supreme Court, Jefferson Equity Term, February, 1917.)

Statutes — validity of, how determined — city of Watertown — Optional City Government Law held unconstitutional — State Constitution, art. XII, § 1.

The validity of a statute is to be determined not by what has been done or what probably will be done but by what it is possible to do under its provisions.

Tested by the rule above stated, the "Optional City Government Law" (Laws of 1914, chap. 444), by the terms of which the electors of cities of the second and third class are permitted to vote on the adoption of any one of several forms of city government designated in said statute and which takes away the qualified negative of the mayor over hasty and inconsiderate action by the common council and confers autocratic power on that body to govern the city in such manner and by what means as it pleases without any limitation or restraint whatever save as to granting franchises, the sale or leasing of real estate, the incurring of municipal indebtedness and submitting propositions to the vote of electors or taxpayers and by which all provisions of the charter and of general or special laws in relation to the form of government of a municipality are superseded, is unconstitutional and void so far as applicable

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to the city of Watertown created by chapter 760 of the Laws of 1897, and a taxpayer's action lies to perpetually enjoin and restrain the officials thereof from organizing the city government under the provisions of said "Optional City Government Law."

A provision of the said "Optional City Government Law," which permits the city council to do away with the restriction of the power of taxation in municipalities and fails to provide any limitation in its place, clearly violates the express command of section 1 of article XII of the State Constitution and cannot be held to be a valid legislative act.

Granting that there are some features of said statute which in and of themselves would not be inimical to the Constitution the invalid provisions are so connected with the general purposes of the act and are so interwoven among its provisions that they destroy the whole act, and, as to eliminate the invalid provisions would be to divest the statute of its most essential features, the whole statute must be condemned.

TAXPAYERS' action to restrain the officers of the city of Watertown from organizing the city government under and pursuant to the provisions of chapter 444, Laws of 1914, known as the Optional City Government Law.

Cobb & Cosgrove, for plaintiffs.

Harold L. Hooker, for defendants.

Laurence Arnold Tanzer and Winifred T. Denison, *amici curiæ*, representing Municipal Government Association of New York State.

EMERSON, J. The city of Watertown now exists by virtue of an amended charter passed in 1897, being chapter 760 of the laws of that year. In the year 1914 the legislature enacted chapter 444, Laws of 1914,

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known as "The Optional City Government Law," by the terms of which the electors of cities of the second and third class were permitted to vote on the adoption of any one of several forms of city government, known respectively as plans A, B, C, D, E, F and G.

The statute further provided that, upon filing with the common council a petition therefor, the city clerk was required to transmit a certified copy of said petition to the commissioners of elections, who should cause the question proposed by such petition to be submitted to a vote of the electors, and, if a majority of the votes cast upon the proposition was in favor of its adoption, the officers provided for in the plan so adopted should be elected at the next general city election and their terms of office should commence on the first day of the second calendar month thereafter, and thereupon the terms of all other city officers should expire, except the members of the board of education and city clerk, and all provisions of the city charter and of all general and special laws inconsistent with said Optional City Government Law should be superseded.

In the fall of 1915, upon a petition therefor, the electors of said city voted upon the proposition to adopt plan C as specified and described in said act, and a majority of the votes cast were in favor of the adoption of that plan.

It is conceded that the time to organize under the Optional City Government Law, as provided in said plan, was extended one year by the legislature, and the executive officials of said city now threaten to carry said plan into execution by the election of the officers therein provided for at the next general election.

The plaintiffs, who are taxpayers of the city, and also officials of the city who will be legislated out of

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office by the operation of said optional city plan, now bring this action and ask that the city officials who are charged with that duty be restrained from holding such election and from organizing the city under said Optional City Government Law on the ground that said act is unconstitutional and, therefore, void. A suit now lies at the instance of any taxpayer to restrain illegal official action or waste of the public funds. Code Civ. Pro. § 1925; Gen. Mun. Law, § 51; *Brill* v. *Miller*, 140 App. Div. 602; *Matter of Reynolds*, 202 N. Y. 440, 441.

An unconstitutional law is absolutely void and, therefore, no law at all. It is the same as if the law had never been passed. *Newell* v. *People*, 7 N. Y. 95.

If, therefore, the Optional City Government Law is invalid, any action taken by the city officials to carry out the same would not only be unlawful but would involve a waste of the public funds. Taxpayers' suits to restrain such action have been frequently upheld under similar conditions. *McCutcheon* v. *Terminal Station Commission*, 168 App. Div. 301, 306; *Andrews* v. *Pierson*, 174 id. 478, 481; *Gibbs* v. *Luther*, 81 Misc. Rep. 612; *Stanton* v. *Board of Supervisors*, 191 N. Y. 430.

The question thus presented involves an inquiry as to the provisions of the present city charter and the method of city government therein provided, and also the provisions of the Optional City Government Law, and the changes sought to be accomplished by that act. The question will then arise whether, under the Constitution, the legislature had authority to pass the latter act and to authorize the changes in the city government which it is proposed to make.

From an examination of the present revised city charter we find that it provides at great length and

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with much detail for the government of the municipality and places many restraints upon the governing body in the interest of the residents and taxpayers of the city. It provides that the elective officers shall consist of a mayor, president of the common council, an alderman and supervisor from each ward, a city judge and three assessors. The aldermen thus chosen are to constitute the common council, over which the president is to preside. The common council is vested with all legislative powers pertaining to the city and also with all powers conferred by the general statutes of the state. The method of city government is set forth at length and it is provided that when the manner of executing the same is not expressly stated in the charter the same shall be provided for by ordinances or resolution of the common council. The common council is also authorized to enact ordinances for any local purposes pertaining to the government of the city, the management of its business and the preservation of the order, peace, health, safety and welfare of its inhabitants, and, to that end, the charter sets forth at great length the subjects on which it is authorized to enact ordinances. The common council is also given the management and control of the finances of the city, including the making up of the annual tax levies, and is invested with all the powers of the board of supervisors in relation to the correction of the city assessment rolls. It is, however, provided that there shall be no raising or expenditure of money except as expressly authorized by the charter, and that the tax to be levied for municipal purposes shall in no event exceed one dollar and seventy cents upon every one hundred dollars of the assessed valuation of the taxable property in the city. The common council has no power to direct any extraordinary expenditure except

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upon a two-thirds vote of its members, nor until such an expenditure has been authorized by the taxpayers at a special election held for that purpose, nor can it borrow any money except as specially authorized by the charter, save in anticipation of taxes then remaining unpaid.

The mayor is made the executive head of the city with a qualified veto over the proceedings of the common council, while the assessors are invested with all the powers and duties of town assessors under the statutes and general laws of the state.

The appointive officers are declared to be a city attorney, treasurer, clerk, engineer, sealer of weights and measures, constables, pound master, commissioners of deeds, city hall janitor, and five commissioners for each of the following boards, viz., public works, health, safety, charity, education and water works, all of whom are to be appointed by the mayor with the consent of the common council. The Public Health Law, as amended in 1913, changed the constitution of the board of health to the mayor and six commissioners to be appointed by the common council upon the nomination of the mayor, but, as so changed, the complexion of the boards remains as above stated. The duties of these city officials are largely of a local character and, therefore, need not be considered here, with the exception of the treasurer and various administrative boards above mentioned.

The city treasurer is declared to be the fiscal officer of the city. He is invested with all the powers and duties of town collectors and is required to collect all taxes levied in the city. He is required to pay over weekly to the county treasurer all taxes collected for state and county purposes and in the meantime all taxes collected by him in excess of $100 must be

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deposited daily in some bank designated by the common council. He is also forbidden to pay out any of the city funds except upon warrants drawn by the common council or some administrative board, which warrants must be countersigned by the city clerk and specify from what fund and for what purpose the same is drawn.

As to the boards above mentioned, the charter declares that they shall be the administrative boards of the city. The board of public works is invested with all the powers and performs all the duties of commissioners of highways in towns. The board of water works has charge of the water system of the city. The board of public safety performs all the duties connected with the police government and discipline of the city and also with the fire department service. The board of health is invested with all the powers and is charged with all the duties conferred upon local boards of health by existing laws, while the board of charities is charged with all the duties of overseers of the poor in towns.

There are many other duties specified in the charter to which it is unnecessary to refer. Those above mentioned have been stated at considerable length in order that it might be understood just what changes in municipal government it was proposed to make by the Optional City Government Law. Turning now to that statute we find that it enacts as follows:

By section 3, that any city which shall adopt one of the methods of government provided in said chapter shall thereafter be governed by the provisions thereof.

By section 4, that none of the legislative powers of a city shall be abridged or impaired by the act, but all such powers are devolved upon such body as shall be the legislative body of the city.

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By section 5, that the existing corporate powers of the city shall not be abridged or impaired by the act, but shall be exercised as herein provided.

By section 7, that all existing ordinances, orders or resolutions at the time the provisions of the act take effect and not inconsistent therewith shall continue in full force and effect until repealed, modified or otherwise suspended.

By section 8, that so far as inconsistent with said act all provisions of the charter and special or general laws are superseded, but where the same are not inconsistent with the act they shall continue in full force and effect until and unless superseded by the passing of ordinances regulating the matters therein provided for.

By section 23, that when a city shall vote to adopt any one of the plans provided for in that act the provisions thereof shall supersede the provisions of the charter and of all general and special laws as soon as the officers there provided for have been elected and their terms of office have commenced, which terms of office are to commence on the first day of the second calendar month succeeding their election, at which time the term of office of each elective officer of the city then in office shall expire.

By section 36, that the legislative power of the council of the city may be exercised by ordinance or rule adopted by the council, and, by section 37, that, until superseded as provided in said act, all provisions of law regulating the exercise of powers and performance of the duties of the officers and employees of the city shall continue in full force and effect. That the council to be selected under plan C shall have power to confer or impose by ordinance upon any officer or employee of the city any duties theretofore conferred

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or imposed upon any officer or employee by provision of law, which powers or duties shall thereupon devolve upon and be discharged by the officer or employee on whom the same shall have been conferred or imposed. But that the provisions of law regulating the exercise of such power or the performance of such duties shall, until superseded as therein provided, continue in force, and that whenever by such ordinance all the powers and duties of any appointive officer or employee of the city are conferred or imposed upon one or more officers or employees, such ordinance may abolish such office or employment and thereupon the term of office or employment of such officer or employee shall expire. That the council under said plan C shall have power to regulate by ordinance the exercise of any power or the performance of any duty by any officer or employee of the city and that, upon passing any such ordinance, every provision of the charter regulating the matters or any of them shall cease to have any force or effect in the city, provided, however, that nothing therein contained shall be deemed to authorize the repeal or superseding of any provision regulating the granting of franchises, the sale or leasing of real estate, the incurring of municipal indebtedness, or the provisions of law requiring any matter to be submitted to a vote of the electors or taxpayers.

Section 43 provides that the council shall succeed to all the powers and perform all the duties of the board of assessors.

Section 86 says that upon the adoption of plan C such plan shall become operative as prescribed in section 23, and the powers of government shall be exercised as provided in said act.

Section 87 says that all the legislative powers of the

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city, however conferred or possessed, are vested in a board to be known as the council of the city, composed of a mayor and four councilmen, all of whom shall be elected at large and shall be for all purposes the common council of the city.

Section 89 says the mayor shall have no power of veto, but he shall preside over the council and have a vote as a member of the same, while sections 90, 91, 92 and 93 declare that all administrative and executive powers of the city shall be vested in a city manager to be appointed by the council, with full power to determine what officers or employees are necessary and to appoint or remove the same, which officers or employees shall perform such duties as may be required by the city manager under general regulations of the council.

As a résumé of these provisions of the Optional City Government Law it will be seen that a mayor and four councilmen are to be chosen, who take their offices on January first, and thereupon the term of office of every elective officer of the city expires, and all provisions of the charter and of general or special laws in relation to the form of government of the municipality are superseded. The council thus elected is to select a city manager who administers all of the affairs of the city. The council is also to exercise all of the legislative powers of the city by ordinance or rule. Until such time as it passes ordinances upon the subject the former provisions of law regulating the exercise of powers and the performance of duties by officers and employees of the city continue in full force and effect, but when the council does pass ordinances upon the subject every provision of the charter upon that subject ceases to have any force or effect in the city, except the provisions of law regulating the grant-

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ing of franchises, sale or leasing of real estate, incurring municipal indebtedness and submitting propositions to the vote of electors or taxpayers. The validity of a statute is to be determined, not by what has been done or what probably will be done, but by what it is possible to do under its provisions. *Stuart* v. *Palmer*, 74 N. Y. 188; *People* v. *Klinck Packing Co.*, 214 id. 138, 139; *People ex rel. Luyster* v. *Cocks*, 172 App. Div. 737.

Tested by this rule we see that the act itself takes away the qualified negative of the mayor over hasty and inconsiderate action by the council, that all limitation and restraint upon the council is removed, and that it has power to pass ordinances having the force of law of whatever nature or kind it pleases. In fact the council is authorized to govern the city in just such manner and by just what means as it pleases without any limitation or restraint whatever, save as to granting franchises, the sale or leasing of real estate, the incurring of municipal indebtedness and submitting propositions to the vote of electors or taxpayers, as above stated. In determining the validity of statutes the law looks to the substance rather than to the form. *People ex rel. Bolton* v. *Albertson*, 55 N. Y. 50; *People ex rel. Denny* v. *Coler*, 173 id. 115.

It is an interesting question, in view of the autocratic powers thus conferred upon the council, whether such a law furnishes the city with the kind of government which is guaranteed by the Federal Constitution.

But, passing this question, there are other reasons which seem unanswerable why this statute cannot be upheld. By the Constitution of the state all legislative power is vested in the senate and assembly. Const. art. 3, § 1.

It is well settled that by investing said bodies with

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legislative power the people trust to their judgment and discretion and that, therefore, in matters strictly legislative the power to legislate cannot be delegated. *Stanton* v. *Board of Supervisors,* 191 N. Y. 428, 432; *Wayman* v. *Southard,* 10 Wheat. 1, 42, per Marshall, Ch. J.; Cooley Const. Lim. 116.

But the legislature possesses powers that are not strictly legislative and, therefore, it is a well settled exception to the rule that the power to make local regulations, having the force of law in limited localities, may be delegated by the legislature to those localities. It is upon this distinction that our whole system of local self government for cities, towns and villages depends. *Clarke* v. *City of Rochester,* 28 N. Y. 634; *Stanton* v. *Board of Supervisors,* 191 id. 428; *Village of Saratoga Springs* v. *Saratoga Gas, E. L. & P. Co.,* Id. 138.

This delegated power, however, only extends to the management of their own local concerns under the charter and regulations that the legislature has provided. The distinction between powers purely municipal that can be delegated and those which involve state functions and, therefore, cannot be delegated is stated in *McGrath* v. *Grout,* 69 App. Div. 314, 320. The former is said to relate to matters of local government and local concern with which the state at large has no specific duties to perform and with which it has no general concern, while the latter includes matters in which the state at large has an interest, such as questions relating to the public health, education, taxation and the like, which are, therefore, said to involve state functions. This distinction is also adverted to and emphasized by the Court of Appeals in *Stanton* v. *Board of Supervisors,* 191 N. Y. 435.

If the powers sought to be exercised, while in form

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of a local character, in fact concern the people at large, or if they involve the performance of functions which are of a state character, they cannot be delegated to the municipality. Otherwise it would be legislating for the state at large and not solely for itself. The judgment and discretion thus exercised would be that of the municipality and not of the legislature, which would involve a delegation of legislative power that it is not competent for the legislature to make. But notwithstanding the powers which may lawfully be delegated to the municipality it must still look to the legislature for its charter and it cannot prescribe for itself in detail the method of its municipal government. Speaking upon this subject a distinguished writer says:

"The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to properly belong to the State; and when it interferes, as sometimes it must, to restrain and control the local action, there must be reasons of State policy or dangers of local abuse to warrant the interposition. The people of the municipalities, however, do not define for themselves their own rights, privileges, and powers, nor is there any common law which draws any definite line of distinction between the powers which may be exercised by the State and those which may be left to the local governments.

"The municipalities must look to the State for such charters of government as the legislature shall see fit to provide; and they cannot prescribe for themselves the details, though they have the right to expect that those charters will be granted with a recognition of the general principles with which we are familiar." Cooley Const. Lim. 191.

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A municipal corporation is merely a local division of the state vested with certain rights of self government in regard to their local and internal concerns. These corporations the legislature is authorized to create and for that purpose it must furnish them with a charter which is the franchise for their existence and provide for them the method of their self government. All of these functions are strictly legislative and cannot be delegated by the legislature. But, having thus organized the municipality and furnished it with the means of self government, the details of administration come within the domain of delegated powers.

It is, however, urged by the counsel for the defendant that this statute does not delegate any powers other than local and municipal. That it does not relate at all to the organization of the city as a municipal corporation, but simply to the manner in which municipal duties shall be performed. I do not so read the act in question. On the contrary, the provisions of section 3, that cities which adopt that plan of government shall thereafter be governed by the provisions of that chapter; of section 4, that all legislative powers of the city shall be possessed and exercised by such body as shall be provided under the terms of the act; of section 5, that the existent corporate powers of the city shall not be construed to have been abridged or impaired by the act but such powers shall be exercised as therein provided; of section 23, that upon the adoption of the plan of city government therein provided the same shall supersede the provisions of the charter and all general and special laws relating thereto and inconsistent therewith, and of section 37, that, where ordinances are passed by the council upon any subject, every provision of the charter relating to the matters

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provided for in such ordinances shall cease to have any force or effect in such city, all tend to the inevitable conclusion that the intention of the statute was to substitute an entirely new charter and form of municipal government for the city.

This would not affect the continuity of the corporation but would involve the exercise of legislative powers which, as we have seen, are vested solely in the legislature by the Constitution and could not, therefore, be delegated to the municipality.

It is also said that this act can be sustained on the theory that the legislature has itself authorized such a plan of city government as should be put in operation under the act, leaving it to the municipality to provide the details of such plan, and, therefore, it is claimed that there has been no delegation of legislative powers.

It was held in the leading case of *Barto* v. *Himrod*, 8 N. Y. 483, that an act passed by the legislature conditioned to become a law only upon a popular vote was unconstitutional. It was said that the people had delegated to the legislature all powers of legislation, that they were entitled to have the legislature exercise its judgment and discretion, and that the legislature could not evade the responsibility of passing laws by providing that they must first be approved by the voters.

The principles of this decision have been somewhat questioned by judicial writers and our courts have held that the doctrine there laid down would not be extended beyond the facts of the case, and in that regard have held that the legislature might enact that a completed law should not take effect until approved by a popular vote. While this distinction may strike the ordinary mind as being somewhat fanciful, yet it is well settled in our courts and, with that limitation, the decision in *Barto* v. *Himrod* is now the acknowledged law of this

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state. *Bank of Rome* v. *Village of Rome*, 18 N. Y. 44, 45; *Bank of Chenango* v. *Brown*, 26 id. 472, 473; *Starin* v. *Town of Genoa*, 23 id. 439, 447; *Village of Gloversville* v. *Howell*, 70 id. 287; *People* v. *Fire Assn.*, 92 id. 317; *People* v. *Long Island R. R. Co.*, 134 id. 508; *People ex rel. Unger* v. *Kennedy*, 207 id. 533.

The rule above laid exists, however, only when the statute is a completed law when it leaves the hands of the legislature. If the enactment itself is incomplete until further action is had the principles above stated have no application. *Barto* v. *Himrod*, 8 N. Y. 483, 490; *People ex rel. Unger* v. *Kennedy*, 207 id. 548.

The purpose of this statute was to furnish a complete plan of city government and the difficulty with the proposition thus advanced is that the legislature has not enacted in this case any completed law upon the subject. It has not defined what the ordinances shall be which are to displace the present city government and it leaves that matter to be determined solely by the city council to be selected under the act. It is the discretion of the city council, therefore, and not the action of the legislature which makes the statute complete.

In the next place the act is invalid in that it attempts to delegate to the municipality the power to regulate duties that are not purely municipal but involve the performance of state functions. It authorizes the abolition of the board of assessors, the board of public safety, the board of health and the board of charity, with the conferring of their duties upon another body which is authorized to regulate the performance of the same. By the city charter the assessors are declared to have all the powers and are required to perform all the duties conferred and imposed upon town assessors by the laws of the state, and, as such, they make the

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assessments for the purpose of levying state and county taxes. In performing these duties they proceed according to the provisions of the General Tax Law which furnishes a uniform system of taxation throughout the state. Their duties are, therefore, of a statewide character as they in part relate to the general system of taxation for the purpose of defraying the expenses of government.

The board of safety has the management and control of the police department, which conserves the public peace, and it, therefore, performs functions not strictly municipal but in which the people at large have an interest, while the duties of the board of health and board of charity are by no means confined to matters in which the municipality only has an interest. The board of health has all the powers and is subject to all the duties conferred and imposed on local boards of health. It acts under the direction and authority of the state department of health which establishes a sanitary code and a system of rules and regulations which are binding on the local boards and supersedes all local regulations when inconsistent therewith. The board of charity also performs duties which in their operation and effect are not confined to merely local interests. The board is clothed with all the powers and charged with all the duties of overseers of the poor in towns and in that respect the city stands in the place of the town. *Nuns of St. Dominick* v. *Long Island City*, 48 Hun, 307.

The state has adopted a general system for the relief of the poor and has created a state board of charities which has supervision of the enforcement of the poor laws. The poor are divided into town, county and state charges, and any needy and deserving poor person, on applying to an overseer of the poor, is entitled to relief. If, however, he should prove to be

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a state or county charge the town is indemnified for the amount expended by the state or county treasurer.

It is clear, therefore, that all of the above boards perform functions of a state character and the effect of the statute is to permit the city council to legislate for the state at large with regard to the performance of their duties. This, as we have seen, is beyond the domain of legislative power.

The act, in my judgment, is further invalid in that it attempts to delegate the power of repeal to the city council. While the statute uses the word "superseded," that term must be construed in the sense of repeal, as to suspend an act is to cease its operation, and this is no more or less than a qualified repeal. It is undoubtedly true that so far as local matters are concerned, which only affect the municipality, the legislature may provide that, upon the adoption of local ordinances, charter provisions upon the subject shall be deemed to be repealed. There have been several adjudications to that effect. *Matter of City of New York (Morris Theatrical License)*, 131 App. Div. 767; *City of New York* v. *Alhambra Theatre Co.*, 136 id. 509; affd., 202 N. Y. 528; *People* v. *Kaye*, 160 App. Div. 644.

This, however, is on the ground that the ordinances are entirely local and concern only the city itself.

So also the legislature may doubtless provide that, upon the existence of certain conditions, a statute shall be repealed and it may refer the matter to some board or tribunal to say whether or not those conditions exist. But in that event the legislature must itself prescribe the conditions and fix some standard by which the same can be ascertained. *Village of Saratoga Springs* v. *Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 138–140, 146; *People* v. *Klinck Packing Co.*, 214 id. 139.

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Manifestly the rule invoked cannot be extended to this case. The legislature has not prescribed the conditions upon which the old charter shall be repealed or provided any standard for that purpose. It leaves it to the city council to be chosen under the act to say what action shall be necessary to effect such repeal. The charter provisions thus referred to do not relate to matters strictly municipal, but affect the state at large, and to allow the municipality to thus determine would permit it to say when and under what conditions state laws and regulations should be superseded or repealed.

Furthermore, it seems to me that the statute is invalid for failure to comply with the provisions of section 1, article XII, of the State Constitution. It is there made the duty of the legislature to restrict the power of taxation in municipalities and, in compliance with this command, the legislature did provide in the charter now in force that the rate of municipal taxation should not exceed one dollar and seventy cents upon each one hundred dollars of the assessed valuation. By the act in question the legislature permits the city council to do away with the restriction and fails to provide any limitation in its place. A statute that so plainly violates the express command of the Constitution cannot, in my judgment, be held to be a valid legislative act.

Finally it is urged by the counsel for defendants that so far as local regulations are concerned the act does not violate the Constitution and that to the above extent its validity should be upheld. Granted that there are some features of the act which in and of themselves would not be inimical to the Constitution, it seems to me that the invalid provisions are so connected with the general purposes of the act and are so interwoven among its provisions that they destroy the

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whole statute. To eliminate these provisions would be to divest the statute of its most essential features, and it cannot be seriously contended that, with these provisions out, the legislature would have enacted the statute. In such cases the whole statute must be condemned. *Duryee* v. *Mayor*, 96 N. Y. 477, 492; *Lawton* v. *Steele*, 119 id. 227, 241; *Rathbone* v. *Wirth*, 150 id. 459, 479; *People* v. *Klinck Packing Co.*, 214 id. 122, 140; *Field* v. *Clark*, 143 U. S. 696.

The plaintiffs' counsel have submitted as a part of their brief the opinion of the attorney-general in *Matter of City of Niagara Falls*, in which that official arrives at the conclusion that the act in question is invalid. While this opinion is by no means controlling, it is useful as giving the views of the chief law officer of the state whose functions are largely to advise the state departments as to the construction and effect of statutes. Further confirmation of the views above expressed is found in the debates of the last constitutional convention. The subject of home rule for cities was one of the most important topics considered by that convention. The debates upon that subject are most luminous and were participated in by some of the most prominent and distinguished lawyers in the country and by former judges of the Supreme Court of many years' experience and high standing upon the bench. Among the questions considered was the present statute and I gather from the report of this debate that all agreed that this statute and all legislation of a like character would under the present Constitution be invalid.

In arriving at the conclusions which I have reached I am not unmindful that statutes ought not to be lightly held invalid and that except in the clearest cases courts, as a general rule, are averse to so holding upon

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the trial. I do not think, however, that this rule has any application to the present case. The action was brought to determine whether the act in question was a valid law. Very important interests are involved and if the city officials were permitted to organize the city government under this act and it should afterwards be held invalid the most chaotic and indescribable confusion would result. The people are entitled to have the validity of the statute determined and under these circumstances the court ought not to decline, even if it could, to pass upon the same.

It follows that the plaintiffs are entitled to a decree adjudging the Optional City Government Law, so far as applicable to the city of Watertown, to be unconstitutional and void and perpetually enjoining and restraining the defendants from organizing the city government under the provisions of that act. As this was designed to be a test case to determine the validity of that law for the purposes above stated no costs should be allowed.

Findings in accordance with this opinion may be prepared and, if not assented to by counsel, the same may be settled before me on five days' notice.

Judgment accordingly.

JOHN HENRY McGILL, Plaintiff, *v.* ESTHER B. McGILL, Defendant.

(Supreme Court, Onondaga Trial Term, February, 1917.)

Marriage — annulment of — when court of equity may annul a — actions — Code Civ. Pro. § 1750.

A court of equity may annul a childless marriage for fraud on proof that the defendant, who long prior to and at the time of the marriage was an incurable epileptic, not only concealed the fact from plaintiff but led him to believe that she was in

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good health, and that but for such concealment and misrepresentation plaintiff would not have married her.

The provision of section 1750 of the Code of Civil Procedure that a marriage shall not be annulled on the ground of fraud if it appears that at any time before the commencement of the action to annul the parties voluntarily cohabited with a "full knowledge of the facts constituting the fraud" means knowledge of which there can be no question.

Plaintiff, upon discovery of his wife's epilepsy, was under no legal necessity or duty to abandon her, but was legally bound to care for her until a court of equity annulled the marriage, and that he cared for and continued to live with her in the same apartment, but without cohabiting with her, did not preclude his right to bring the action.

ACTION for annulment of marriage on the ground of fraud.

L. T. Fetzer (William F. Canough, of counsel), for plaintiff.

Madden & Jordan, for defendant.

Ross, J. The husband sues to annul the marriage upon the ground that he was induced to enter into the marriage contract by the defendant's concealing from him that she was an epileptic, and in leading him to believe through statements to that effect that she was in good health.

It was proved that, at the time of the marriage, the defendant was, and for some time prior thereto had been, afflicted with epilepsy, and she has been ever since an epileptic. The parties were married March 9, 1912, in Syracuse. The defendant refused to join her husband that night, and he remained at his room at the hotel, and she remained at her home. The following night the plaintiff returned to his home in New York city. On March twenty-third, the defendant came to

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New York, accompanied by her aunt, the witness, Mrs. H. Lepper. A few days later the defendant was taken ill in her room, and the aunt refused to allow the plaintiff to enter. After a time, having gained admission, he found his wife lying on the bed, very pale and unable to talk. In April, the parties went to Stamford, Conn., and lived there until about June first with the plaintiff's parents. About June first they returned to New York. In September, the defendant became pregnant, and early in December, either there was an abortion performed upon her, or she had a miscarriage. During the time the parties lived together, the defendant had frequent attacks of illness, or, what has been termed in the evidence by some of the witnesses, fits; which, in the light of all the evidence, were undoubtedly epileptic seizures. While in Stamford, Conn., the defendant was attended by one Dr. Cloonan, and later in New York by one Dr. Porter, and subsequently by Dr. Solley. The plaintiff testifies that the first time he knew that his wife had epilepsy was on December 12, 1912, when he was so informed by Dr. Solley; that after that time he did not cohabit with the defendant; that he continued to live with her and slept in the same room as there were only two rooms in the apartment, and he continued to care for her until she went to Craig Colony on April 15, 1915. There is no living issue of the marriage.

Counsel have cited no case in this state wherein the action to annul a marriage was based upon the defendant's being an epileptic. The recent decision of *Elser* v. *Elser,* 160 N. Y. Supp. 724, is such a case, and will be referred to further on.

I have no hesitation in finding that the defendant, at the time of her marriage and for a long time before, was an epileptic, and so far as medical science can

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determine is incurable; and that the defendant and her aunt not only concealed such fact from the plaintiff but misrepresented her condition; that but for such concealment and misrepresentation the plaintiff would not have entered into the marriage contract.

With reference to what occurred after the marriage to call his attention to the disease from which his wife was suffering, we must not be too strict in extending the doctrine of constructive notice to the case of a lover zealously courting the woman of his choice or to an anxious husband earnestly seeking to ascertain the cause of his wife's illness and to cure the same.

Section 1750 of the Code of Civil Procedure, which empowers the court to annul a marriage on the ground of force, duress or fraud, provides as follows: "But a marriage shall not be annulled * * * on the ground of fraud, if it appears that, at any time before the commencement thereof [*i. e.*, the action to annul], the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud."

The meaning of this provision clearly appears in the case of *Wendel* v. *Wendel*, 30 App. Div. 447. This was a case in which the defendant had her ovaries removed by a surgical operation. It appeared that she informed her husband before her marriage that she had undergone a surgical operation which made it doubtful whether she had capacity to bear children; that the plaintiff alleged that he discovered the loss of the ovaries on the first night after the performance of the marriage ceremony, and that thereafter he continued to cohabit with her until she was too ill with the fever to longer indulge him. In the case cited, there can be no question that the plaintiff voluntarily cohabited with his wife with a full knowledge of the facts which

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he claimed constituted the fraud. In the case under consideration, under a reasonable interpretation of the evidence, can it be said that the defendant had a full knowledge of the facts constituting the fraud until December 12, 1913, when he was first told by a physician that his wife had epilepsy? Certainly, from that time on, the evidence does not justify a finding of a voluntary cohabitation with the defendant. Let us test this situation by the ordinary rules of human conduct which govern the conduct of a man of average intelligence and moral sensibility. This young man, in March, marries the woman of his choice. It is true that there were rumors that the defendant, to whom he was engaged to be married, was subject to epileptic seizures, but he was assured by her that this was not true, and the evidence of the conversations had with her and her aunt with whom she lived, and the visit to Dr. Mooney, all point to the conclusion that it was the defendant's purpose, in which she succeeded, to deceive his as to her actual condition; that after the marriage she had, from time to time, attacks which probably were epileptic seizures, and he procured at different places where they resided and at different times the best medical advice that he could afford, and to him was obtainable; and that none of these men, until December, told him that she was subject to epileptic seizures. The plaintiff testified on cross-examination that prior to the time he consulted Dr. Solley in December, 1912, he thought the fits which the defendant had were hysterical, and that after he consulted with the doctors he thought they were not epileptic.

Dr. William M. Trader, one of the staff of physicians at Craig Colony, a witness for the defendant, said on cross-examination that the appearance of a patient suffering from an attack of hysteria and suf-

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fering from an attack of epilepsy is somewhat similar, and that the distinction would not be apparent to an ordinary lay observer.

As presumably a faithful husband, he was endeavoring to do his whole duty to effect a cure from whatever disease she was suffering. It is evident from the language of the Code that the words "full knowledge" mean something more than the ordinary notice which may be inferred from circumstances; it means, as illustrated in the *Wendel* case, a knowledge about which there can be no question. We must bear in mind "that a full knowledge of the facts constituting the fraud" means, not only knowledge of the disease, but knowledge of the facts constituting the fraud, knowledge that the defendant had epilepsy at the time of her marriage, and that she then knew that fact.

In this case, the most important contract which a man can make, affecting his whole life, was based upon fraud, and a court of equity ought not to be zealous in endeavoring to sustain a contract with such a foundation, and the language of the Code should prevent the court from extending the rule of constructive notice applicable to the case of the notice a master should have of the safety of the appliances used in the prosecution of his business, and the knowledge which is sometimes inferred against a person who is dealing with a trustee as to the character of the transaction, to the case of a zealous lover or a faithful husband.

With reference to the claim that he cohabited with his wife after the discovery in December, 1912, that she had epileptic seizures, no question of construction is involved in this, for I have no hesitation in finding that he did not cohabit with her at all. He cared for her as well as his circumstances permitted, and pro-

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cured, as soon as he could, her commitment to a proper institution for treatment. He was under no legal necessity or duty to abandon her, but was under the legal duty of caring for her until such a time as that duty should be terminated by the action of a court of equity.

Svenson v. *Svenson*, 178 N. Y. 54. This was an action brought to procure an annulment of the marriage between the plaintiff and defendant on the ground of fraud in that the defendant, at the time of the marriage, was suffering from a chronic and contagious venereal disease, which he concealed from plaintiff. In that case the marriage was not followed by cohabitation as man and wife. It appears that the defendant had, before the trial, recovered from the disease. As bearing upon the attitude of the courts towards marriages procured by fraud, the following excerpts from the opinion are instructive. On page 57, Mr. Judge Martin, writing for the court, says: "Obviously the principle that refuses relief in cases of ordinary ill-health after the marriage contract has been actually consummated has no application to a case like this, where there has been no consummation and the disease is one involving disgrace in its contraction and presence, contagion in marital association, and includes danger of transmission and heredity that even science cannot fathom or certainly define. The suppression of the presence of a disease including such dire and disastrous possibilities, directly affecting the marital relation, constitutes a fraud which clearly entitles the innocent party to a decree annulling the marriage contract, particularly when it has not been *consummated*. 'Marriage begins by contract and results in a *status*. If, before children are begotten, before debts are created, real estate involved, and the

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community have long recognized the relation, the injured party seeks relief from fraud, error or duress, it seems clear that no consideration of public policy will prevent a court from annulling a marriage where the relation has not fully ripened into the complications of a public *status*. In such case the marriage is but little more than a contract; and, in view of the serious consequences to follow, the degree of fraud which vitiates a contract should be sufficient.' "

In the case of *di Lorenzo* v. *di Lorenzo,* 174 N. Y. 467, on page 472, the court says: " While, then, it is true that marriage contracts are based upon considerations peculiar to themselves and that public policy is concerned with the regulation of the family relation, nevertheless, our law considers marriage in no other light than a civil contract. The free and full consent, which is of the essence of all ordinary contracts, is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement and without which he would not have done so; justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract, if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule."

Sobol v. *Sobol,* 88 Misc. Rep. 277. Annulment action tried before Mr. Justice Blanchard. The fraud claimed was that the defendant had tuberculosis and concealed that fact from the plaintiff, and misrepresented the facts as to his health. The learned justice, in deciding the case for the plaintiff, uses the follow-

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lowing language on page 282: "It would seem to me a gross perversion of justice to refuse to release a party from a matrimonial contract whereby no important status affecting the relationship of the parties to the general public or to each other has been established in the face of a situation which, as between the parties and the probable normal result of their continuing union, is attended with an element of such grave potential results." While there is danger of infection in association with a person afflicted with tuberculosis which does not exist in the case of epilepsy, yet so far as is apparent to the medical world at this time the danger of transmission of epilepsy to offspring is vastly greater than in the case of tuberculosis, and the chance of cure much less. This case is interesting as extending the rule for annulment of marriage in the case of fraudulent concealment or statements to other than venereal diseases. *Domschke* v. *Domschke,* 138 App. Div. 454.

In *Anonymous,* 21 Misc. Rep.. 765, cited with approval in *Svenson* v. *Svenson,* 178 N. Y. 60, Judge Truax granted a decree of annulment upon the report of a referee. The defendant husband, in a conversation during their engagement, told the plaintiff that he was in good health, whereas the fact was he was suffering from a chronic and contagious venereal disease (not syphilis) and which his wife contracted, and from which she suffered so acutely that her life was in danger. It is undoubtedly true that the fact that one party to a marriage has, at the time, a venereal disease, is abhorrent to every sense of justice and decency. It means the unchastity of the defendant, the pollution of the innocent victim, and means indecency on the part of the wretch who precipitates such a wrong upon an innocent person who, in the fullness of

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her affections, yields her person to his embraces; yet, when we consider the comparative consequences, it would seem to be somewhat of a refined distinction of equitable principles to grant an annulment in the case of a person suffering from a disease described in the case cited as one of a less virulent character than syphilis, and refuse it to a person chained to an epileptic. Both should be freed from an alliance that has no possibility of happiness, and almost a certainty of misery, not only to the parents, but, in the case of epilepsy, to at least the second and probably the third generation.

In *Meyer* v. *Meyer*, 49 How. Pr. 311, which is only a report of a referee in which a judgment was directed declaring void the marriage contract on the ground that the consent of the husband was obtained by fraud, it appeared from the evidence that the plaintiff was suffering from a disease of the vaginal and uterine tract, but it did not appear that the disease was contagious or infectious, and did not imply unchastity. The learned referee uses this language: "The fact that she offered herself to the plaintiff for marriage amounted to a representation, which the plaintiff had the right to believe, that she was in a marriageable condition, and free from disease which would hinder her from entering into that relation."

Dr. William Trader, a physician of nine years' experience at the Craig Colony for Epileptics, who was sworn as a witness for the defendant, stated on his direct examination that there is no fixed rule that an epileptic must be vicious; that some are very kind, but at times they have periods when they are destructive, and in some cases vicious and savage. In bearing upon the terrible potentialities to the offspring of epileptic parents, this physician states that about fif-

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teen per cent of the children of epileptics are afflicted with that disease, and he further states on cross- examination that he means in the case where either parent has epilepsy. He further states on cross-examination that it is possible and it happens that the disease skips one generation, appearing in the grandchildren and not in the children.

The excellent work of William Pryor Letchworth, "Care and Treatment of Epileptics," says (p. 2): "From the dawn of history the disease has been enveloped in mystery, a mystery which is not even now dispelled, and into which it may be said the light of science has not practically penetrated. * * * 'All the facts which the pathological anatomist and the physiological chemist have gained in the study of this dire malady give no explanation of the *process* that gives rise to the epileptic phenomena.'" (P. 6): "'In the majority of cases epilepsy leads to permanent mental disturbances, consisting of intellectual weakness of all degrees, from a slight diminution of mental power to complete idiocy. Not infrequently this is accompanied by morbid changes of character. * * * In addition to permanent degeneration, there occur in epileptics more or less acute mental disturbances. The most important point in connection with these, according to Siemerling, is a dream-like state of consciousness of varying duration and form, with or without delusions, memory lost or only clouded. These 'twilight states' are especially feared because while they endure, deeds of violence are not infrequently committed.'"

It is well known that in this dream-like state, some of the most atrocious crimes are committed, of which the patient, upon returning to consciousness, is entirely oblivious. It may be stated with reasonable certainty

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that three-fourths of the cases of true epilepsy begin under twenty years of age; that it is a progressive disease, and that if the seizures continue after the age of puberty the recoveries are very rare. It may also be stated that the most prolific cause of epilepsy is heredity. It has been stated by an authority upon this subject that in the case of 535 children, offspring of epileptics, thirty-six per cent died in infancy from convulsions, fifteen per cent became epileptics, and only twenty per cent were normal.

At the Twenty-fifth National Conference of Charities and Correction, Dr. James C. Carson, superintendent of the Syracuse State Institution for Feeble-Minded Children, gave expression to the following views upon this subject: "Considering the vast import of insanity, epilepsy, and feeble-mindedness in relation to their own and other forms of degeneracy, a law prescribing some extraordinary penalty should be upon the statute-books of every state for the seduction of any insane, epileptic, or feeble-minded woman; and, further, every state in the Union ought to prohibit the marriage of any person of either sex belonging to any of these classes." Care and Treatment of Epileptics, *supra*, p. 13.

The case of *Gould* v. *Gould*, 78 Conn. 242 (1905), is instructive in showing the trend of legislation in dealing with sexual relations which are fraught with the consequences of the gravest moment, not only to the parties immediately concerned, but to society at large. This was an action for a divorce or a decree of nullity upon the ground that it was in violation of a statute. It appears that in 1895 a statute was enacted which read in part as follows: "No man and woman, either of whom is epileptic, imbecile or feeble-minded, shall intermarry, or live together as husband and wife, when

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the woman is under forty-five years of age. Any person violating or attempting to violate any of the provisions of this section shall be imprisoned in the state prison not less than three years." General Statutes, chap. 325, § 1354.

In 1899, the plaintiff, at the age of twenty-three, married the defendant, who was an epileptic. In 1903 a child was born, and she soon afterwards learned of this statute and brought this action for a divorce or decree that the marriage was null and void. In her complaint the plaintiff alleged that the defendant, although an epileptic, falsely and fraudulently concealed this fact from her and represented that he never had epilepsy, and in consequence of which representations, which she believed to be true, she entered into the contract of marriage. The principal question considered in this case was the validity of the statute, which was upheld, and it was held that it was within the power of the court to grant a divorce upon the statutory ground of fraudulent contract. On page 245 the court, in commenting upon the statute, uses the following language: "While Connecticut was the pioneer in this country with respect to legislation of this character, it no longer stands alone. Michigan, Minnesota, Kansas and Ohio have, since 1895, acted in the same direction. 2 Howard on Matrimonial Institutions, 400, 479, 480; Laws of Ohio, 1904, p. 83. Laws of this kind may be regarded as an expression of the conviction of modern society that disease is largely preventable by modern precautions, and that it is not unjust in certain cases to require the observation of these, even at the cost of narrowing what in former days was regarded as the proper domain of individual right. It follows that the statute in question was not invalid, as respects marriages contracted by epileptics, after it took effect."

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The states of New Jersey, Wisconsin and North Dakota have also enacted laws to prevent the marriage of epileptics. New Jersey P. L. 1904, p. 270; Laws of Wisconsin, 1911, chap. 663, § 498; North Dakota, Laws of 1913, chap. 207, § 1, and also Code of Iowa, § 2600-p, and § 2600-q.

The case of *Elser* v. *Elser,* 160 N. Y. Supp. 724 (1916), was an action brought by the husband to annul a marriage upon the grounds, *first,* that the defendant was physically incapable; *second,* that he was induced to enter into the marriage contract through fraud in her concealing from him that she was an epileptic. The learned judge found the facts in favor of the defendant, and refused to annul the marriage. In view of the finding that there was no fraud, the case is not an authority here. The learned judge states as follows: "I had a physician called to examine the wife, and he testified that the statistics show that in about 16 per cent. of the epileptic cases covered by the records from which the statistics were compiled the taint was inherited. The plaintiff's counsel urges that public policy requires an annulment decree in order to prevent the coming into the world of progeny tainted by an epileptic strain, but we have not as yet come to that refinement of civilization." The decision of the court did not rest upon the above quoted statement, which was *obiter dictum.* Men like Dr. Carson and Mr. Letchworth, to whose utterances I have referred, who have devoted their lives to the study and treatment of epilepsy and kindred diseases, are our highest authority as to the causes and consequences of epilepsy. There is nothing in an actual "refinement of civilization" which a court of equity should shun.

The case of *Lyons* v. *Susanne Barney, otherwise known as Susanne Lyons,* 132 Ill. App. Ct. 45, cited by

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the defendant's counsel, is distinguishable from the case at bar. As stated by the court in the *Lyon* case: "The representations alleged to constitute fraud in this case were mere opinions of the cure inspired, it may be, by a longing hope for relief from the awful malady with which she was afflicted, based upon an absence for some time of its distressing manifestations. The existence of the disease was known to appellant to have been of long duration (15 years) and in the absence of any artifices resorted to by the appellee, operating to prevent an inquiry on his part, the law put him upon inquiry, and, failing to make any, he must bear the consequences of his imprudence and haste." In the instant case, the plaintiff was ignorant of the previous diseased condition of the defendant, and relied not upon her representations of a cure, but as to the fact of her suffering from the disease.

In arriving at the conclusion that a court of equity should annul the marriage in question, I have in mind that fortunately there are no children.

I believe that the safeguards the law has thrown around the marriage relation do not demand that this unfortunate defendant shall be permitted, by her misfortune and misrepresentations and concealments, to drag down the life of the plaintiff which is full of promise, especially when such a union, at best, would be childless, and, at worst, would produce a progeny of potential epileptics, over whose lives heredity would cast its dark shadow, which would extend even across the lives of their descendents.

Judgment accordingly.

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SOPHIE C. BROSEMER, Plaintiff, v. SOPHIA BROSEMER, EMMA MONGIN and CAROLINE F. BROSEMER, Impleaded with L. BROSEMER BREWING CO., ALBERT E. BROSEMER and JOHN F. BROSEMER, Defendants.

(Supreme Court, Oswego Trial Term, February, 1917.)

Negotiable instruments — construction of "agreement binding upon the holder" — extension of time of payment — when plaintiff entitled to recover on note against the makers and indorsers — Negotiable Instruments Law, § 201.

The words "agreement binding upon the holder" in section 201 of the Negotiable Instruments Law, which declares that a person secondarily liable on the instrument is discharged "by any agreement binding upon the holder to extend the time of payment," etc., should be construed to mean an agreement binding upon the holder made with the principal debtor.

Where upon the refusal of a bank to renew a note made by a corporation for a loan and indorsed by its stockholders one of them, plaintiff herein, upon purchasing said note gave her own note in part payment and as collateral security therefor left the sold note with the bank and upon payment of her own note took up and became the sole owner of the note held by the bank which could at any time it held said note as collateral accept payment or bring an action thereon, if requested by the indorsers, plaintiff is entitled to recover thereon in an action against the makers and indorsers.

THIS action was tried at an Oswego County Trial Term, held at the village of Pulaski in May, 1916. At the close of the evidence, both sides moved for a directed verdict; the jury was excused and the case was submitted to the court.

P. W. Cullinan, for plaintiff.

Barnes & Mournigham, for Sophia Brosemer, Emma Mongin and Caroline F. Brosemer, defendants.

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HUBBS, J. In September, 1909, the Second National Bank of Oswego, N. Y., loaned to the L. Brosemer Brewing Company $10,000 upon its unindorsed note. The note was renewed from time to time upon the same kind of a note. The L. Brosemer Brewing Company was a domestic corporation and all of its stock was owned by members of the Brosemer family, five brothers and sisters. Each owned one-fifth of the stock. The time came when the bank became dissatisfied with the loan and refused to renew it unless the five stockholders of the company would indorse the note. This was done and the bank carried the loan for some time secured by a note indorsed by the five stockholders of the company.

On June 27, 1913, the said company delivered to the bank its note for $10,000, dated that day and payable three months from date, indorsed by the said five stockholders, the defendants in this action. This note was given to take up a prior one for the same amount and indorsed by the same parties. The note was not paid when due on September 29, 1913, and it was duly protested. The bank refused to renew the note and insisted that it be paid.

At the time the last note became due the plaintiff, who is the wife of John F. Brosemer, one of the defendants, had an interview with the three defendants who are defending herein, Sophia and Caroline F. Brosemer and Emma Mongin, in which it was understood and agreed that the plaintiff should purchase the note from the bank. The plaintiff thereafter entered into a written agreement with the bank to purchase said note. That agreement with the bank was dated December 1, 1913, and it acknowledged the receipt from the plaintiff of $5,000 in part payment of said note and recited as follows: "The balance of

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the purchase price of said note is to be paid in two months from the date hereof according to the tenor of a certain promissory note in writing, bearing date this day, made by said Sophie C. Brosemer, payable two months after date to the order of John F. Brosemer, at the Second National Bank, Oswego, N. Y., and indorsed by him. * * * That said bank may retain said note so sold to Sophie C. Brosemer as collateral security for the payment of said note of five thousand dollars ($5,000) made by Sophie C. Brosemer." Thereafter, the plaintiff paid her $5,000 note to the bank and took up and became the sole owner and holder of the $10,000 note given to the bank by the brewing company and indorsed by the defendants. Later she commenced this action upon said note against the brewing company and the indorsers thereon. The three defendants defending herein set up in their answer and contended upon the trial that they were accommodation indorsers upon said note and that they had been released from liability thereon by reason of a binding extension agreement made by plaintiff, whereby the time of payment of said note was extended without reserving the right of recourse against said defendants.

The extension agreement relied upon by the defendants is the agreement entered into between the plaintiff and the Second National Bank at the time of the purchase of said note by plaintiff from said bank and hereinbefore referred to.

The plaintiff contends that the defendants were in fact makers of the note in question and therefore primarily liable thereon, although they were in form indorsers and were treated as such by the bank. I have found, however, that defendants were not makers of said note, but indorsers.

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By the agreement between the plaintiff and the Second National Bank, the bank sold the note to plaintiff upon her paying $5,000 in cash and giving her note for $5,000, payable in two months, and leaving the note in question with the bank as collateral. The agreement reads: "That said bank may retain said note so sold to Sophie C. Brosemer as collateral security for the payment of said note of five thousand dollars ($5,000) made by Sophie C. Brosemer." Under this agreement, the bank held said note as collateral security to the note of $5,000 given by the plaintiff, up to the time when plaintiff paid her $5,000 note and took the note in question.

During the period that the bank held the note as collateral, it was in a position at any time to accept payment or to bring an action thereon if requested by defendants so to do. Crawford's Ann. Neg. Inst. Law, §§ 53, 90, and notes; 8 Corpus Juris, 600.

Assuming, however, that there was an agreement between the plaintiff and the bank to extend the time of payment of the note in question, such an agreement would not have the effect of releasing the indorsers on the note.

Defendants contend that the agreement between the plaintiff and the bank released the defendants, who were, as they say, secondarily liable as indorsers, because of section 201 of the Negotiable Instruments Law, which reads as follows: "A person secondarily liable on the instrument is discharged: * * * 6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved."

Prior to the enactment of the "Negotiable Instruments Law" the rule of law which defendants invoke

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was usually stated substantially as follows: "If a creditor or obligee, by a valid and binding agreement, without the assent of a surety, gives further time for payment or performance to the *principal debtor*, the surety will be discharged." 32 Cyc. 191.

In the case of *National Park Bank* v. *Koehler*, 204 N. Y. 178, Judge Gray wrote: "The existence of the general rule is not in dispute that, if there has been an agreement by the *creditor* with the *principal debtor*, which extends the time of payment of the debt, without the consent of the surety, or indorser, the latter is discharged." As stated by Judge Gray, the rule that applies to a surety applies also to an indorser. Brandt on Suretyship (3d ed.) § 3.

It will be noted that subdivision 6 of section 201 of the Negotiable Instruments Law does not use the words *principal debtor*, or their equivalent, the wording being "By any agreement binding upon the holder to extend the time of payment." Does that mean by any agreement binding upon the holder made with a stranger to the instrument, or must the binding agreement be made with the principal debtor? The question does not seem to have been passed upon since the enactment of the statute in question or of similar statutes in other states.

It seemed to be well settled prior to the enactment of the Negotiable Instruments Law that an agreement between the holder of the instrument and a third person would not release the surety or indorser. The general rule, practically as above stated, has often been stated by the courts of this state, but the exact question does not seem to have ever been passed upon in any reported case in this state.

In *Fraser* v. *Jordan*, 8 El. & Bl. (Q. B. 1858) 303, the plea stated that the holder entered into a valid

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binding agreement with a stranger to extend the time of payment thereby releasing the surety. Coldrige, J., after stating that a binding agreement *between the holder and principal* released the surety, said: "We think the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor, having given no consideration for the promise, has no ground to complain of a breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him; and we see nothing on which any right, either in law or in equity (see Lord Abinger's 5 M. & W. 253–4) for him to insist on such a contract, can be founded. The stranger may have some private reason of his own to wish for some indulgence to be shown, and if he has given a good consideration may be entitled to damages, nominal, or large or small, according to any legal interest he may have; but surely he is the only person to take advantage of his contract. No such doctrine, as that there can be a discharge in such case arising from a contract with a stranger, has ever yet been established. In all the text-books which were cited, the rule is laid down as to a binding contract with the *acceptor or principal debtor.*" The plea was held to be bad. This case has been followed in England. *Clark* v. *Birley*, 41 Ch. Div. (North, J., 1889) 422, 434; The Laws of England, Vol. 15, 553. The same has been held in the following cases in our own country: *Herbert* v. *Servin*, 41 N. J. L. 225; *Parker* v. *Taylor*, 91 N. W. Rep. (Neb.) 537; *Cheek* v. *Glass*, 3 Ind. 286; *Wright* v. *Independent Nat. Bank*, 96 Va. 728. See also the following authorities where the rule is stated: 8 Corpus Juris, 429; Childs' Sur. & Guar. § 108; 32 Cyc. 198; Norton Bills & Notes (3d ed.), 307.

It would seem that the reasoning of the court in the

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case of *Fraser* v. *Jordan,* which has for so many years been uniformly followed, is just as applicable to the construction of the statute in question as it was as a statement of the common law, when written. It would seem that the words of the statute "agreement binding upon the holder" should be construed to mean an agreement binding upon the holder made with the principal debtor.

By a valid agreement to give time is meant an agreement for the breach of which the maker or the acceptor has a remedy, either at law or in equity. *Veazie* v. *Carr,* 3 Allen, 14.

It has been said that the statute in question should be regarded simply as a codification of the common law. *Chemical National Bank* v. *Kellogg,* 183 N. Y. 98.

In the case of *National Bank of Mechanicsburg* v. *Graham,* 246 Penn. St. 256, the court, in writing of the provision in the Negotiable Instruments Law of Pennsylvania, which reads the same as the New York statute, said: "This was simply declaratory of the existing law."

It is undoubtedly true that the words of the statute are to be given their natural and common meaning and when the meaning is clear and free from doubt it should be enforced regardless of the holdings of the courts prior to its enactment. Where there is doubt, however, and the meaning contended for is contrary to all former decisions and entirely without support in the law as it stood before the enactment, then the law as it stood before the enactment becomes a valuable guide in finding the true meaning of the statute.

Judgment for plaintiff.

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PURE STRAINS FARM COMPANY, Plaintiff, v. EDWIN C. SMITH and DELBERT C. HEBBARD, Defendants.

(Supreme Court, Monroe Trial Term, February, 1917.)

Actions — to cancel mortgage on real property — to determine claim — when action in equity will not lie — deeds — Code Civ. Pro. § 1496 et seq. and § 1638 et seq.

An action to cancel a mortgage on real property brought by one who claims to be the legal owner under a recorded deed is an action to determine a claim to the property under section 1638 *et seq.* of the Code of Civil Procedure, and where the defendants set up a conveyance to them by foreclosure under the mortgage and ask for a dismissal of the complaint and such other and further relief to which they may be entitled, the case is triable by a jury.

The sections of the Code of Civil Procedure relating to the recovery of real property (§ 1496 *et seq.*) and those relating to the determination of a claim to real property (§ 1638 *et seq.*) provide exclusive remedies for any issues coming within the scope of their provisions, and an action in equity will not lie to accomplish the purposes for which those sections were provided unless special facts are alleged showing that the remedy at law is not adequate and bringing the case under equitable cognizance.

Actions brought under section 1496 *et seq.* of the Code of Civil Procedure are triable as of right by a jury and actions brought under section 1638 *et seq.* are triable by a jury where the defendants claim an estate in the property and an issue of fact is raised.

MOTION by plaintiff at Monroe Trial Term, February 5, 1917, to strike the case from the jury calendar on the ground that it is an equitable cause of action.

Edson W. Hamn, for motion.

Chamberlain & Page (Philetus Chamberlain, of counsel), opposed.

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RODENBECK, J. 1. An action affecting the title to real property may be in the nature of an ejectment (Code Civ. Pro. § 1496 *et seq.*) or in the nature of an action to determine a claim to real property (Id. § 1638 *et seq.*) or equitable in character not coming within either of the foregoing statutory provisions. In order to bring the action, however, within equitable jurisdiction it is necessary for the plaintiff to show that his remedy is neither for ejectment nor to determine a claim to real property under either set of the provisions above referred to. This means that the plaintiff must show that he has no adequate remedy at law and special facts must be alleged bringing his case within equitable cognizance. The plaintiff in this case has not done so. It has not alleged the failure of an adequate remedy at law nor has it alleged any facts or circumstances which require the intervention of a court of equity. *Moores* v. *Townshend*, 102 N. Y. 387; 32 Cyc. 1309.

At common law an action to try the title to real property could not be maintained by one in possession. *Lewis* v. *Howe*, 174 N. Y. 340. The Revised Statutes, however, allowed such a proceeding by a person in "actual possession." The Code of Procedure sought to convert this proceeding into an action (§ 449), but it seems that the practice grew up of resorting to either form of remedy. *Haynes* v. *Onderdonk*, 2 Hun, 619. As incorporated in the Code of Civil Procedure plaintiff was required to be in "actual possession" in order to maintain an action to determine a claim to real property (§ 1638 *et seq.*) and this language remained until 1891 when the word "actual" was stricken out (*Akin* v. *Meeker*, 78 Hun, 387), so that now constructive possession in the plaintiff is sufficient (*Clason* v. *Stewart*, 23 Misc. Rep. 177), and pos-

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session is presumed to exist in one having the legal title. *Whitman* v. *City of New York*, 85 App. Div. 468; *Clark* v. *Kirkland*, 64 Misc. Rep. 585; *Mitchell* v. *Einstein*, 42 id. 358. The plaintiff in this action claims to be the legal owner of the property in question. If it is not in possession of the property it has the right to maintain an action to recover the property under section 1496 *et seq.* of the Code of Civil Procedure, but it is presumed to be in possession under its legal title and therefore may maintain an action to determine the claim to the property under the mortgage in question under section 1638 *et seq.* of the Code.

2. The provisions of the Code referred to relating to the recovery of real property and the determination of a claim to real property are exclusive remedies for any issues coming within the scope of their provisions and an action in equity will not lie to accomplish the purposes for which those sections were provided unless special facts are alleged showing that the remedy at law provided by them is not adequate and that resort must be had to a court of equity to secure proper relief.

3. Actions of ejectment under section 1496 *et seq.* of the Code have always been triable by a jury and actions under section 1638 *et seq.* are made triable by a jury where the defendant raises an issue of title. In this case such an issue has been raised. The defendants allege that the mortgage has been foreclosed, that the plaintiff was a party to the action, that there was a judgment, sale and conveyance thereunder and demand a dismissal of the complaint and such other and further relief as may be necessary and equitable. Under the pleadings the defendant is entitled to a jury trial of the issues raised. Code Civ. Pro. § 1642; *King* v. *Ross*, 28 App. Div. 371; 16 Cyc. 52 55.

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The motion to strike the case from the calendar is denied and the case is directed to be placed at the head of the added list of cases.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE MULHOLLAND COMPANY, Relator, *v.* WILLIAM E. NOWAK, THOMAS E. WOODS, ALFRED METZ, GEORGE LINK and JOHN G. BENNETT, Constituting the Common Council of the City of Dunkirk, New York, Respondents.

(Supreme Court, Chautauqua Trial Term, February, 1917.)

Mandamus — alternative writ of — city of Dunkirk — pleading — contracts — judgments.

The issues presented by an alternative writ of mandamus requiring the common council of the city of Dunkirk to audit and pay the bill of relator for the sale of a motor-chemical fire apparatus and the answer of respondents, considered, and judgment awarded directing that the bill be audited and paid from any moneys legally applicable thereto and in the absence of such funds that the amount of such claim be included in the next tax levy.

While a want of funds might have constituted a defense if pleaded and proven, it was a sufficient answer, to a contention that the purchase of said apparatus was unauthorized and the contract therefor invalid because the budget made no provision for relator's claim, that no such defense was interposed by respondents' answer.

APPLICATION for a writ of mandamus.

Rebadow, Ladd & Brown (Thomas J. Cummings, of counsel), for relator.

Lyman A. Kilburn, City Attorney, for respondents.

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COLE, J. An alternative writ of mandamus was granted requiring the common council of the city of Dunkirk to audit and pay the bill of the relator amounting to $6,700 for the sale of a motor-chemical-fire apparatus. The respondents, the common council of the city of Dunkirk, served an answer. By stipulation the present councillors are substituted as parties defendant. The issues presented by the writ and answer were tried before the court, a jury being waived. The following facts appear:

The common council of the city of Dunkirk consists of five members, one of whom is elected from the city at large and is known as "councilman at large." He is the presiding officer of the common council "and in the absence of the mayor of the city" he shall "become acting mayor with the same powers and duties possessed by the mayor."

By section 160 of the city charter of Dunkirk it is provided also: "The board of police and fire commissioners of the city of Dunkirk shall consist of the commissioners so elected and the mayor of the city, who shall by virtue of his office be the presiding officer of the board."

The elected commissioners are two, thus making the board consist of three members.

During the year 1914 the said board consisted of John T. Sullivan, mayor, and John Dean and William H. Brophy.

The proceedings of the board of police and fire commissioners show that in May, 1914, the board decided to advertise for bids upon specifications prepared, filed and published for a motor-chemical-fire apparatus, all the members including the mayor voting affirmatively upon the resolution. Bids were accordingly advertised for and the relator was the

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lowest bidder at $6,500, and on August 31, 1914, at a meeting of the board the following resolution was passed:

"*Resolved,* that the motor-fire-apparatus and pumper be purchased from the Mulholland Company at its bid of $6,500.00, said company to furnish standard connections, including a "Y," self-starter, electric lights and to furnish a guarantee satisfactory to the Board of Police and Fire Commissioners before the contract of such apparatus is executed."

This resolution was carried, Dean and Brophy voting aye and the mayor voting no.

On September 14, 1914, the following resolution was unanimously passed at a meeting of this board:

"*Resolved,* that the clerk be directed to notify the Mulholland Company of the action of the commissioners with regard to the purchase of the motor-fire-apparatus and pumper, and that a further provision be embraced in the contract specifications to the effect that the pump must stand the State Underwriters' test of eight hundred gallons (800) per minute before acceptance by the commissioner."

On November 3, 1914, representatives of the relator appeared before the board and advised them that the apparatus and pumper had arrived, and the *mayor informed them* that a contract embodying the provisions stipulated by the board "at the time the board voted to accept the Mulholland Company's offer" would have to be submitted and signed before final action would be taken.

On December 7, 1914, at a meeting of the board the relator submitted a contract and the same was referred to the city attorney. At the same meeting it was moved and carried, Dean and Brophy voting aye and Mayor Sullivan voting no,

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"That the minutes of the meeting of the Board of Police and Fire Commissioners of August 31, 1914, in so far as they relate to the resolution of Commissioner Dean authorizing the acceptance of the bid of the Mulholland Company for the purchase of motor-fire-apparatus and pumper be amended and passed as follows:

"By Commissioner Dean: 'Resolved that the motor-fire-apparatus and pumper be purchased from the Mulholland Company of this city at its bid of $6,500, said company to furnish standard connections, including 'Y,' self-starter, electric lights and to furnish guarantee satisfactory to the Board of Police and Fire Commissioners before the contract for such apparatus is executed, the cost of the self-starter to be $200 in addition to said bid' and that the minutes of said meeting as so amended be and the same are approved."

No further meeting was held until the special meeting hereinafter stated.

As will be seen from the foregoing the mayor, who originally had been in favor of the purchase of a motor-chemical-fire apparatus, for some reason was opposed to awarding the contract to the Mulholland Company, although it was the lowest bidder. The term of office of Commissioners Dean and Brophy was about to expire December thirty-first, and they were known to be favorable to the proposition of awarding the contract and accepting the apparatus from the relator.

On December twenty-fourth Dean and Brophy called on the mayor at his office and asked for a special meeting to finish up the purchase of the motor-fire-apparatus and it was then and there unanimously agreed that a meeting would be held on December

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twenty-eighth at eight o'clock P. M. I find this, notwithstanding a conflict in the testimony.

On December twenty-eighth in the afternoon Dean and Brophy each received from the mayor a letter advising them that he had been "unexpectedly called out of town on very important personal business, which demands my immediate attention," and that "the board will not convene this evening." As a matter of fact the mayor went to Buffalo, which is fifty miles distant and between which two cities trains run every few hours, and he remained away until January first when the terms of office of Dean and Brophy expired. He purposely absented himself in order to prevent the holding of a meeting which he had agreed upon with the other members of the board, and at which he knew the relator's purchase would be closed up if the meeting were held.

No rules for calling special meetings of the board existed, but they were accustomed to arrange for their meeting sometimes by mutual agreement, sometimes by oral notice and sometimes by written notice and sometimes by getting together and holding the meeting. This meeting was arranged and agreed upon in the usual way.

Dean and Brophy met at the agreed time notwithstanding the mayor's attempt to call off the meeting. At this meeting Dean was chosen to act as chairman and Brophy to act as clerk. The city attorney's report on the contract executed by the relator was presented and ordered filed. The city attorney reported that the contract presented contained all the provisions required, with the exception of the provision called for by the resolution of November second (meaning the one of September fourteenth) "that the pump must stand the State Underwriters' test of 800 gallons

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per minute. * * * There is a provision, however, that said pump shall be capable of pumping 800 gallons per minute. Whether the absence of this provision in the contract is a matter of any importance is for your board to determine. With the exception above noted I approve of the above contract and believe that it contains all the provisions set forth in the specifications, and the further provisions required by the board in the various resolutions with reference to this matter."

The meeting was thereupon adjourned to December twenty-ninth at eight o'clock P. M., and the acting clerk was required "to notify the Mayor and City Clerk of the adjournment." They were unable to notify the mayor of the adjournment. The adjourned meeting was held at the appointed time, December twenty-ninth, at eight P. M., Dean and Brophy attending. The Mulholland contract executed in duplicate was by resolution approved, and it was further resolved: "That this board is satisfied with the guarantee contained in said contract that the pumping capacity of said apparatus is up to specifications, and that the Underwriters' test, if there be any such test, is hereby waived."

The contract was signed by the two commissioners. The bill of the Mulholland Company for $6,700 was approved and certified to the common council for payment, who thereafter refused to order it paid, whereupon this proceeding was instituted. The contract between the relator and the city would have been complete when the bid was accepted by the resolution passed August thirty-first, were it not for the fact that such resolution accepting the bid required a self-starter and a guarantee before the contract was to be executed. The provision relative to self-starter was

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in fact complied with and the contract in that respect became an executed one by tendering a machine so equipped. By resolution of a subsequent date the sum of $200 was to be paid for this additional equipment and the minutes of the meeting of August thirty-first at which the Mulholland bid was accepted were accordingly amended. The machine was tendered containing the additional equipment, and a contract signed by the Mulholland Company. This machine as presented with the contract signed by the relator taken in connection with the preceding resolutions, in my opinion, constituted a complete contract, which when executed on the part of the relator entitled it to its pay, unless it be that the written contract failed to embrace a provision to the effect "that the pump must stand the State Underwriters' test of 800 gallons per minute." It should be noted that this resolution of September fourteenth did not require a *certificate* of the State Underwriters' Association, but simply that the *contract* to be signed by the relator should contain a *provision* that "the pump must stand the State Underwriters' test of 800 gallons per minute."

The contract presented contains no provision that the pump will stand the "State Underwriters' test," but does contain a provision guaranteeing that "the pump shall be capable of pumping 800 gallons per minute." There was no proof that the State Underwriters' Association apply any test to fire apparatus or that it is a matter over which they have anything to do.

I am of the opinion: *First.* That inasmuch as no one at the trial seemed to know anything about any State Underwriters' test or that there is any such test the contract as presented contained a sufficient compliance with the requirement of the board, and that without

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any further meeting of the board the relator presented a case of a completed contract executed on its part and entitling it to have its bill certified to the common council and by them to be ordered paid.

Second. If it was necessary to have a meeting in order to pass upon or to waive this particular requirement that the contract should contain a provision that "the pump must stand the State Underwriters' test" then this meeting was a valid meeting.

The meeting is presumed to be regular. *Rome* v. *Whitestown Water Works Co.*, 113 App. Div. 547; *People ex rel. Locke* v. *City of Rochester*, 5 Lans. 11; 20 Am. & Ency. of Law, 1213.

The charter contains no provision relative to special meetings or the method of calling, and there is no ordinance on the subject, the board having been accustomed to hold special meetings and to arrange for them by mutual agreement, or upon oral notice. The agreement on December twenty-fourth to hold the meeting on December twenty-eighth and the mayor's statement at the time that a special meeting would be held at a stated time for a special purpose constituted a sufficient notice of the meeting.

In *Matter of Extension of Church Street*, 49 Barb. 455–458, it appeared that the commissioners held meetings by arrangement and by oral notification which were held to be valid.

It is contended by the defendants that in the absence of the mayor the councilman-at-large was acting mayor, and should have been notified. The meeting was regularly called by the mayor when he agreed thereto on December twenty-fourth, and the other commissioners were not required to give further notice of the meeting, either to the mayor or to the acting mayor, although had he seen fit to appear he

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would have been entitled to participate in the meeting *provided the mayor were actually and in good faith absent and unable to attend.*

Furthermore the act of the mayor in purposely absenting himself from the city, within reaching distance of which he was all the time, in order to prevent the meeting, did not in my opinion constitute such "absence from the city" as gave the acting mayor any authority to act. *Mayor of Detroit* v. *Moran,* 46 Mich. 213.

It is further claimed that this purchase was unauthorized and the contract invalid for the reason that the budget adopted in April, 1914, made no provision for this item. This proof was received over the relator's objection.

It is sufficient answer to this contention that no such defense was interposed by the answer. *People ex rel. Schank* v. *Green,* 64 N. Y. 499.

Want of funds is a defense to be alleged and proved. *Bullock* v. *Town of Durham,* 64 Hun, 380; *Boyce* v. *Town of Shawangunk,* 40 App Div. 593; *Adsit* v. *Brady,* 4 Hill, 630; *Hines* v. *City of Lockport,* 50 N. Y. 236.

While a *want of funds* might have constituted a defense if pleaded and proven (*People ex rel. Dannat* v. *Comptroller,* 77 N. Y. 45–50; *People ex rel. Downing* v. *Stout,* 23 Barb. 338), yet no such defense is in fact asserted. There is no pretense that the city is without such funds available to pay this claim, or without the means or authority to obtain the funds, but simply that this item was not provided for in the budget.

In many if not most of the city charters, provisions are found for an appropriation of funds to the several departments, and in many that no indebtedness shall be contracted in any year for any department in excess of the estimate in the budget, and that the funds of one

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department shall not be applied to the uses of another department. In charters containing such provisions it is clear that mandamus will not lie, where there has been no appropriation of funds applicable to the payment of the particular claim, or where an indebtedness is incurred in excess of the estimates. Such are *Kip* v. *City of Buffalo*, 123 N. Y. 55; *Swift* v. *City of New York*, 83 id. 528; *Beckwith* v. *City of New York*, 121 App. Div. 462.

In the absence of such provision the contracting of an indebtedness in excess of the estimates contained in the budget is not unauthorized, nor is it a defense in mandamus proceedings, provided there are funds available or which can be obtained for the payment of the claim. *People ex rel. Childs* v. *Cartwright*, 9 Hun, 159; *Mutual Gaslight* v. *Mayor*, 49 How. Pr. 227.

The charter of the city of Dunkirk provides for estimates from the heads of the various departments, and for the adoption of a budget therefrom (§ 170), and that when the budget shall have been completed "the amount shall be levied as the tax for the ensuing year" (§ 170) and the common council is authorized to levy "such sum as may be necessary *for the purposes herein specified*, and *in accordance with such estimates*, not to exceed the sum of $60,000 in any one year." § 170. The italics are mine.

And by section 173 the common council is prohibited from incurring any liability "beyond this title." The charter contains no provision appropriating to any particular department the amount of funds called for by the estimates for that particular department, nor does it prohibit incurring an indebtedness in excess of the estimate for any particular department, nor does it prohibit the use of funds incurred in the estimate of one department from being used for another depart-

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ment. It appears to be all city funds. It limits the amount that can be levied to $60,000 and prohibits incurring liability "beyond this title."

I think in view of the other provisions that the words "beyond this title" must mean beyond the amount limited by this title, to wit, $60,000.

The fact that there is no money in the particular fund from which it can be paid will not avail if there is any fund from which it can be paid. *People ex rel. Dannant* v. *Comptroller*, 77 N. Y. 45.

I do not think the failure to include this item in the estimate constitutes a defense.

Findings may be prepared in accordance with the foregoing suggestions, and judgment awarded directing the common council to audit the relator's bill at $6,700, with interest from December 29, 1914, and to pay the same with the costs of this action from any moneys applicable to the payment thereof, and if there are no such funds legally applicable to the payment of said claim, then that such amount be included in the next tax levy. Costs are awarded to the relator.

Ordered accordingly.

FEDERAL HEATING COMPANY, INC., et al., Plaintiffs, *v.* CITY OF BUFFALO and HAGER & GEORGE, INC., et al., Defendants.

(Supreme Court, Erie Equity Term, February, 1917.)

Assignments — of moneys to accrue from performance of municipal contract — when valid — contracts — evidence — Lien Law, § 16 — liability of city to materialmen — waiver — city of Buffalo.

An assignment of moneys to accrue from the performance of a municipal contract made by the contractor for the benefit of specific materialmen, to enable the work to be completed, is valid.

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Where on the contractor's default in the performance of a contract for the construction of public buildings the city might either sue for damages or take over the contract as agent of the contractor and at its expense, an agreement with a committee of the contractor's creditors to let them complete the building and to pay them the amount still due on the contract was within the rights of the city.

An objection that parol evidence is inadmissible to vary or change a written contract may not be raised by one not a party to the contract, the parties thereto not objecting, particularly if the testimony explains but does not vary the contract.

Under section 16 of the Lien Law, an assignment of funds due a contractor is effective from the time of filing and takes precedence over liens of materialmen subsequently filed.

An assignment of all moneys due under a contract for public work given by the contractor to one named as "trustee" provided that all treasury warrants under the contract should be receipted for by the trustee and the proceeds used for the benefit of the materialmen participating in the assignment which was duly filed. Waivers by the trustee in certain various sums were filed by the contractor who received from the city comptroller certificates which were credited to the contractor's individual bank account and no part thereof was used to discharge the liens to secure which the assignment was made. *Held*, that the bank, having knowledge of the assignment but making no effort to ascertain the extent of the trustee's power, was liable to the creditors of the contractor participating in the assignment for such amounts as were paid out on the unauthorized waivers.

That the city was liable to materialmen participating in the assignment for money paid to the bank on unauthorized waivers which were filed with the comptroller and by him certified to the bank for payment, and that the contractor was also liable to said materialmen for said amounts.

That for moneys paid under the waivers of assignment in violation of the terms thereof the trustee was also liable to such materialmen.

That the contractor was entitled to the balance of the contract price remaining after the city had paid the committee of his creditors for completing the work subject to the claims of legitimate lienors.

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Where the contract with the committee of the contractor's creditors provided that the committee should be paid the actual cost of completing the work and then "all lawful claims against the said fund on the part of materialmen, laborers or subcontractors" should be paid, and the balance paid to the committee as representing creditors, the committee thereby subordinated its own claim to the claims of materialmen, laborers and subcontractors, and in view of the city ordinance requiring protection of the claims of laborers and materialmen which had already accrued the original assignment to the trustee was subordinate to such claims.

ACTION to determine the validity and priority of various claims to funds applicable to the payment of the contract price for the construction of municipal work.

Moot, Sprague, Brownell & Macy (S. F. Carr, of counsel), for plaintiffs.

George E. Pierce, for defendant city of Buffalo.

Ernest F. Kruse, for Bank of North Collins.

Hoyt & Spratt (Thomas D. Powell, of counsel), for defendant Hager & George, Inc.

Reginald F. Penton, for defendant Charles A. Hager.

Thomas C. Burke, for McNeill Lumber Company, Inc., and James A. White as receiver of McNeil Lumber Company.

William S. Stearns (Thomas C. Burke, of counsel), for Albert G. Burlage, Allen W. Powers, Fred J. Ranz, F. C. Hager and others, down to and including Robert E. Congdon, and for J. W. Van Dusen.

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George C. Riley, for F. C. Hager, Florence A. Hager *et al.*

Kellogg & Baker (Philip A. Sullivan, of counsel), for Buffalo Builders' Supply Company.

Killeen, Karl & Chapin (Ray Donnelly, of counsel), for New England Oil, Paint and Varnish Company.

Henry W. Killeen, for John M. Hoen.

Clinton T. Horton, for Thomas Paint and Supply Company, also appearing for Horton, Large & Schreiber, committee.

Julius A. Schreiber, in person.

BISSELL, J. There is involved in this action the determination of the validity and priority of the various claims of several parties to the funds of the city of Buffalo applicable to the payment of the contract price for the construction of two children's pavilions for the J. N. Adam Memorial Hospital belonging to the city of Buffalo at Perrysburg, N. Y.

On August 4, 1914, the city entered into a contract with Hager & George, Inc., a corporation, for the construction of these pavilions for the sum of $98,980, which was afterward, by reason of certain changes, reduced to the sum of $96,360.22, of which there was paid to the contractor or its assigns $79,365.95, leaving a balance of $16,994.27, when the completion of the work by reason of the default of the contractor was taken over by the city.

On April 3, 1915, Hager & George, Inc., had become indebted to the plaintiffs for materials furnished, and seven liens had been filed against the unpaid balance

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of the contract price then amounting to about $35,000. To enable the work to proceed it was necessary for these liens to be discharged, and after several meetings of the lien creditors and other materialmen with the contractor it was agreed that the moneys which would thereafter become available under the contract, to the extent of $34,369.65, should be assigned to one John M. Hoen, trustee; which was accomplished by two instruments dated April 3, 1915, providing the manner in which the trustee should use the moneys thus assigned when they were paid by the city of Buffalo pursuant to the terms of the contract, and among other things providing that $6,500 of moneys previously assigned to the Bank of North Collins should be paid over to Hoen, and should be used by him to make partial payments upon the then existing liens of the plaintiffs, $1,450 of this sum to be used to pay bills then due to certain specified materialmen who had not filed liens. The specific payments out of the $6,500 aggregated $4,878.29. As a consideration for the assignment to John M. Hoen, trustee, the liens which had been filed by the plaintiffs in this action were discharged of record, and the lienors then looked only to the assignment which was made for their benefit and the benefit of specific materialmen above mentioned.

The assignment made by Hager & George, Inc., to the Bank of North Collins, referred to in the agreement with Hoen, was for $7,000, dated March 24, 1915, and delivered by Charles A. Hager to the bank on March 25, 1915, which on that day credited to Hager's individual account $3,500. After the agreement of April 3, 1915, $3,428.29 was paid to Hoen, and used by him, in accordance with the agreement, to apply upon the liens, and to pay certain small claims mentioned in

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the agreement. This amount was paid to Hoen on the 6th of April, 1915, by New York draft, drawn by the Bank of North Collins, payable to the order of John M. Hoen, and returned to the bank with this indorsement: "John M. Hoen, Hager & George, Inc., by John M. Hoen, trustee." The balance of the $7,000 assignment of which Hoen was to receive $6,500 was credited to the account of Charles A. Hager by the bank on the eighth, thirteenth and twenty-second days of April, after the bank had paid to Hoen the first $3,428.29, so that when the bank credited the $3,500 of the $7,000 assignment to the account of Charles A. Hager it knew that a part of the balance of the assignment had been paid to Hoen under an agreement between Hager & George, Inc., and Hoen, styling himself trustee. Hoen received only $1,200 of the second $3,500 credited to Hager on the $7,000 assignment, making in all $4,628.29 of the $6,500 which it was agreed Hoen should receive of the $7,000 assignment.

Prior to the assignment to Hoen, trustee, dated April 3, 1915, the Bank of North Collins had from time to time advanced moneys on assignments of moneys due under the contract between the city and Hager & George, Inc.; and each time that such advances had been made the bank had received a certificate from the city comptroller showing that such assignment had been made. After the agreement with Hoen, and on the 19th day of April, 1915, the bank received a certificate made by the comptroller that a waiver of the assignment by Hager & George Inc., to J. M. Hoen, trustee, had been filed in the office of the comptroller of the city of Buffalo, and this certificate specifically stated; "Said waiver being signed by John M. Hoen as trustee for $3,500 against contract for erecting children's pavilions at J. N. Adam Hospital." This certificate was delivered to Charles

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A. Hager, who then delivered it to the Bank of North Collins, which credited to his account the amount of the certificate, and its cashier admits that he noticed that John M. Hoen had waived an assignment from Hager & George to him as trustee, but that he made no inquiry as to Hoen's authority before executing the waiver, nor did he inquire into the purpose of Hoen's trust, nor as to the persons for whom he was acting as trustee.

On the 18th of May, 1915, Hoen again executed a waiver of the assignment to him as trustee to the Bank of North Collins, and the city comptroller delivered to Charles A. Hager a certificate to the extent of $7,000 in form similar to the one presented at the bank on April nineteenth. The bank credited the amount of this waiver to the account of Charles A. Hager, and subsequently $5,000 of this amount was paid to Hoen. On May 25, 1915, another waiver of his assignment was made by John M. Hoen as trustee for $2,300, and the comptroller again delivered to Hager a certificate which was taken by him to the Bank of North Collins, which credited the face of the waiver to Hager's individual account. No part of this $2,300 was paid to Hoen. A fourth assignment was made by Hoen on the 29th of May, 1915, for $800, and a certificate issued in the same form as the previous certificates. It was taken to the Bank of North Collins by Mr. Hager, and the face of the certificate deposited to the credit of Charles A. Hager. Mr. Hoen received no part of this money.

Altogether Hoen, trustee, executed waivers of his assignment in favor of the Bank of North Collins in the aggregate sum of $13,600, and the bank received from the city of Buffalo $11,450 upon these assignments, $5,000 of which was paid over to John M. Hoen.

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One thousand four hundred and fifty dollars of this money was used for pay-roll upon a contract for construction work at Scarsdale, N. Y., and had no relation to the construction work at Perrysburg, or the purpose for which the agreement of April 3, 1915, was made; and $400 of the money paid over to Hoen was used for pay-roll upon another contract at Waterford, N. Y. Neither of these payments was for the benefit of the claimants mentioned in the assignment to Hoen. The bank paid out the moneys which it had credited to Charles A. Hager, upon Hager's individual checks, and made no inquiry as to the purposes for which the money was to be used.

In the latter part of June, 1915, Hoen made another waiver of assignment for $7,000, upon which he made an unsuccessful attempt to obtain money from the Bank of North Collins, and he then served a notice upon the comptroller, in which he stated in substance that the waivers of assignment in favor of the Bank of North Collins had been obtained through fraud, and that he canceled the outstanding waivers. The city thereupon refused to pay the balance of the $2,300 assignment, amounting to $1,350, and the $800 waiver of assignment, and this amount ($2,150) has remained in the city treasury since that time.

After the assignment to Hoen of April 3, 1915, the contractor, Hager & George, Inc., had not progressed with the work in a manner which was satisfactory to the city, and on or about the 3d day of July, 1915, the city served upon the contractor and its bondsmen a notice provided for by the contract, which gave the contractor five days in which to increase its force and supply necessary material for the proper and speedy completion of the buildings, and to notify it that upon its failure to furnish such increased force and additional

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material the city would take possession of the buildings and the contractor's tools, plants, appliances and material; that the city would take possession of the same, and avail itself of all the rights and privileges granted under the contract. The contractor did nothing after the receipt of this notice, and immediately after its service negotiations were started between the city and Clinton T. Horton, Julius A. Schreiber and Fred R. Large, as a committee of creditors, subcontractors and materialmen of Hager & George, Inc., for the completion of the buildings; and on the 22d day of July, 1915, the deputy building commissioner informed the committee that he had determined to allow them to complete the buildings. His letter of notification read in part as follows: "It has been agreed that you are to take charge of the completion of the work to be done under these contracts. *This means that the City has taken over the work under the Hager & George contracts, pursuant to the notice sent to that concern and its bondsmen, and is employing your committee as the authorized representatives of the materialmen and sub-contractors to complete the work,* for which you are to be paid all that is left in the city treasury credited to said contracts, after deducting all lawful claims against said funds on account of the material, labor, or sub-contractors which may exist at the time of the completion of the work. It is also understood that the Bank of North Collins makes a claim of $2,150 against this fund, and that the amount of such claims will be left in the city treasury until the right to it is determined either by litigation or agreement. Of course it is also understood that the work is to be done in strict pursuance of the contracts and specifications."

The committee immediately undertook the comple-

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tion of the buildings. At the time of serving the notice, and entering into the agreement and understanding with the committee, there was to become due under the contract on the completion of the buildings the sum of $16,994.24. Material was furnished, labor performed, and payments made during the progress of the work by the committee, to the amount of $12,200, which left in the hands of the city treasurer applicable to this contract the sum of $4,794.27. The committee proceeded with the work until the buildings were substantially completed, but there were left undone certain items of work, and certain amounts of material were not furnished which it was necessary to furnish to fully complete the contract, and finally the committee left the buildings in an incomplete state, with the understanding that the city was to complete such minor defects as existed; and it was agreed between the committee and the city that the value of installing these various items, which would fully complete the buildings, was the sum of $1,250, this amount being deducted from the amount of cash in the hands of the city treasurer and leaving $3,544.27 applicable to the payment for material and labor furnished under the contract hereinbefore referred to. The committee proved upon the trial that it has furnished material and performed labor to the extent and value of $2,293.55, for which it has not been paid. After this amount is paid there will be left in the hands of the treasurer of the city of Buffalo the sum of $1,250.72. Evidence was given on the trial to support the claim that a proper item of expense in completing the contract was the superintendence and financial assistance furnished by Messrs. Horton and Schreiber, two members of the creditors' committee, who undertook the completion of the buildings, and that the value of such

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services was $1,500; but the committee's services were rendered in the interest of their clients as well as acting for the city and the funds in the city treasury should not be depleted by the payment of this allowance as agains the lawful claims of laborers and materialmen.

John M. Hoen had given to some of the parties, for whose benefit the assignment to him of April 3, 1915, was made, undertakings that he would faithfully perform the duties imposed upon him by that contract, and after Messrs. Horton, Schreiber and Large had been appointed a committee of creditors to complete the contract they discussed with him an assignment of all of his rights under the contract of April third, and as a result it was agreed that Hoen should assign to the committee all of his rights under that contract; and in consideration of the release by said creditors of the undertakings which Mr. Hoen had provided he sold to the committee the contractor's plant and equipment, so that there would be no claim on the part of Hager & George, Inc., that it had any rights either to the contractor's plant and equipment, or to the moneys to become due under the contract with the city, or any right under that contract whatsoever. The committee also obtained from Hager & George, Inc., a consent to the transfer by John M. Hoen of said plant and equipment, and an assignment of all the rights of Hager & George, Inc., in and to the contract and moneys to become due thereunder.

Under the assignment to Hoen of April 3, 1915, the moneys to be collected by him were not to be used on behalf of the contractor to finance the work, but as the agent of the creditors named therein, to receive and disburse the funds assigned for their benefit, in accordance with the terms of the agreement. It is a valid

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assignment of moneys to accrue from the performance of the contract between the city and Hager & George, Inc., for the payment of the claims for which liens had been filed to the extent of $13,875.45, and $1,512.94 for which liens could be filed, and for the other purposes set forth in the assignment. *Bates* v. *Salt Springs National Bank,* 157 N. Y. 322; *Brace* v. *Gloversville,* 167 id. 452.

Under the terms of the contract between the city and the contractor the city had the right, when the contractor failed, to proceed with the erection of the buildings and have them completed within the time provided for in the contract. The city had the right either to serve a five days' notice as provided for in the contract, to terminate the contract, or to take possession of the buildings, tools, plant and appliances, and to complete the buildings as the agents of and at the expense of the contractor. The city chose to proceed under the latter provision of the contract, and entered into an agreement with the creditors' committee referred to, agreeing to pay the balance to become due under the contract, to wit, the sum of $16,994.27 to the committee as follows: It agreed to pay as the work progressed the actual cost of the labor and material, and after that expense had been met if there was any money left applicable to the contract it was to be used to pay the lawful liens and claims, and after the lawful liens and claims had been paid, if anything remained, the balance was to be paid to the committee. The city was acting within its rights in proceeding in this manner, and chose one of the two courses which were open to it, to wit, either to complete the buildings at the expense of the contractor, or to cancel the contract and seek to recover damages. It adopted the equitable course in the circumstances, giving the lien-

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ors and claimants all of the benefits which they could possibly derive and at the same time insuring to the defendant city the completion of the contract for the amount agreed upon. *Van Clief* v. *Van Vechten,* 130 N. Y. 571; *Fraenkel* v. *Friedmann,* 199 id. 351; *Dennison Construction Co.* v. *Manneschmidt,* 204 id. 404.

A number of liens were filed against the funds in the city treasury, all of which liens were for labor rendered and materials furnished to the contractor prior to the time of the service of the notice by the city taking over the completion of the contract and entering into the agreement with Messrs Horton, Schreiber and Large. There are no claims for material or labor against the committee, which completed the buildings. The contract between the committee and the city for the completion of the buildings consists of the letters between the committee and the superintendent of buildings. Upon the trial proof was offered and received under objection to explain and make more clear the intention of the parties. It was claimed by some of the defendants that the testimony on this subject violated the rule that testimony could not be given to vary or change a written contract. This rule has no application where the objection is raised by a person not a party to the contract, and the contract here being between the committee and the city, neither of which objected to the admission of the testimony, it was competent to show by such testimony the intention of the parties. Such testimony did not tend to vary or change the terms of a written contract, but simply to explain the meaning thereof. *Juilliard* v. *Chaffee,* 92 N. Y. 529.

"Oral testimony as to the conversations which preceded the execution of the appellant's written consent was incompetent. * * * The general rule which

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excludes evidence of parol negotiations and undertakings, when offered to contradict or substantially vary the legal import of a written agreement, applies only in controversies between the parties to the instrument." *Hainkinson* v. *Vantine,* 152 N. Y. 20, 30.

All of the liens and claims against the funds applicable to the construction of the pavilions were filed after the 6th of April, 1915, and after the two assignments which were concurrently executed to John M. Hoen were filed with the comptroller and the commissioner of public works, and are inferior to the claims of the plaintiffs under the Hoen assignment, with the exception of the claims of the creditors' committee, Horton, Schreiber and Large, for the cost of completing the work to be done under the contract. Section 16 of the Lien Law provides that such an assignment shall have effect and be enforcible from the time of filing. The assignment to Hoen therefore takes precedence over the liens subsequently filed. *Stevens* v. *Ogden,* 130 N. Y. 182; *Bates* v. *Salt Springs National Bank, supra; Brill* v. *Tuttle,* 81 N. Y. 454; *Lauer* v. *Dunn,* 115 id. 405; *McCorkle* v. *Herrmann,* 117 id. 297; *Beardsley* v. *Cook,* 143 id. 143.

The defendant Bank of North Collins had notice of the fiduciary capacity in which John M. Hoen was acting and is liable to the plaintiffs for the moneys not paid to Hoen under the $7,000 assignment dated March 24, 1915, and for all moneys deposited to the individual credit of Charles A. Hager upon the waivers of assignment made in the bank's favor by John M. Hoen.

In *Suarez* v. *De Montigny,* 12 Misc. Rep. 259; affd., 1 App. Div. 494; 153 N. Y. 678, it was held, " The rule is stated in the American and English Encyclopedia of Law, volume 27, page 264, as follows: ' Those who deal with a trustee upon the faith of the trust estate which

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he represents are bound at their peril to know the extent of the trustee's power. It is only when they have no notice of a trust, either actual or constructive, that they are to be protected in the possession of trust property, or in the enjoyment of rights acquired through dealings with the trustee.' And the rule thus stated is amply sustained by the authorities." *Swan* v. *Produce Bank,* 24 Hun, 274; *First National Bank* v. *National Broadway Bank,* 156 N. Y. 459; *Fellows* v. *Longyor,* 91 id. 324, 331; *Kirsch* v. *Tozier,* 143 id. 390.

The city of Buffalo is liable to the plaintiffs for all moneys paid to the Bank of North Collins on waivers of assignment made by John M. Hoen, trustee. The assignment to Hoen provided that all treasury warrants when drawn should be received and receipted for by Hoen and the proceeds used for the benefit of the plaintiffs as therein stated. The assignment was filed with the proper officers of the city, but its provisions were disregarded, and warrants and the proceeds thereof were delivered by the city to the Bank of North Collins without the knowledge or consent of the plaintiffs. Altogether the city paid the Bank of North Collins $11,450 upon waivers of assignment, of which the bank used $6,450 to reimburse it for moneys previously advanced to Charles A. Hager, and $5,000 was paid to John M. Hoen. There is no proof that any of the parties who were entitled to receive the money under the assignment to Hoen ever received any part of the sum of $6,450. It was the duty of the city of Buffalo to deliver warrants as they became due to John M. Hoen, trustee, alone, as it had notice that he was acting in a fiduciary capacity for the plaintiffs, and it also had notice of the purposes for which he was to use the proceeds of these warrants, and when the city delivered any warrants or the proceeds thereof to any party

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other than Mr. Hoen, whether upon his waiver or otherwise, the city was rendered liable to the plaintiffs for any failure of the application of the funds to the purposes for which the assignment to Mr. Hoen had been made. *Holt* v. *Colonial Trust Co.*, 97 App. Div. 305; *Moore* v. *American Loan & Trust Co.*, 115 N. Y. 65.

The defendant Charles A. Hager is also liable to the plaintiffs for the moneys which he received from the Bank of North Collins upon the assignment of March 24, 1915, and the waivers of assignment made by the defendant Hoen as above set forth. It was proved on the trial that Hager individually received $6,500 of the $7,000 under the assignment to the bank of March 24, 1915, and there is no evidence that the persons entitled to receive these moneys under the assignments to Hoen, which were executed in behalf of Hager & George, Inc., by Charles A. Hager as secretary and treasurer, ever received any part of the remainder of the $6,500.

The evidence is that all of the moneys paid by the city to apply upon these waivers of assignment were used by the Bank of North Collins to pay antecedent indebtedness of the defendant Charles A. Hager to the bank.

The defendant John M. Hoen is also liable to plaintiffs for moneys which he received, and for the moneys paid to the Bank of North Collins upon his waivers of assignment, and not devoted to the purposes mentioned in the assignment dated April 3, 1915. It was proved on the trial that all of the moneys received by Mr. Hoen were credited to his account in the Third National Bank, aggregating the sum of $12,006.29, and that all of these moneys were used for payments in accordance with the assignment, with the exception

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of $1,850, which the defendant Hoen used to meet payrolls of Hager & George, Inc., upon the contracts which they had for construction work at Scarsdale, N. Y., and Waterford, N. Y.; and for this amount, together with the balance of the moneys as hereinbefore stated which were paid to the Bank of North Collins, and not received by Hoen as trustee, the defendant Hoen is personally liable to the plaintiffs.

The city was acting within its rights in contracting with the committee to complete the work and to pay therefor the actual cost of completing the work, and the original contractor would be entitled to the balance of the contract price after paying for the completion of the work, and this balance, if any, would be subject to the claims of legitimate lienors. *Fraenkel* v. *Friedmann*, 199 N. Y. 351.

The liens for labor and materials filed against Hager & George, Inc., will attach to the funds in the city treasury to the extent of the difference between the cost of completion and the amount unpaid the contractor or its assigns, or in other words to the balance due the contractor after paying the cost of completion. *Van Clief* v. *Van Vechten, supra.*

As above stated, on July 22, 1915, the balance in the city treasury available for the completion of the contract was $16,994.27. The contract of the creditors' committee with the city for completion was that the committee should be paid the actual cost of completing the work, that then "all lawful claims against said fund on the part of the materialmen, laborers or subcontractors" should be paid, and the balance paid to the committee as representing plaintiffs. The "lawful claims of materialmen, laborers or subcontractors" did not refer to any indebtedness created by the committee, for the Lien Law would protect any

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such claims, but necessarily referred to indebtedness incurred by Hager & George, Inc., in the prosecution of the work. Any claim of the committee through assignment from Hager & George, Inc., to Hoen and from Hoen to the committee does not come within the term "lawful claims against said fund on the part of the materialmen, laborers or subcontractors." The committee consequently, by its contract with the city, subordinated its own claim by assignment, to "the claims of materialmen, laborers and subcontractors."

In completing the work the committee actually expended the sum of $14,493.55 and owes $51.55, making $14,545.10 as the total cost of completion. Of this amount the committee received $2,550 from the sale of certain contractor's equipment of Hager & George, which had been conveyed to the committee to enable it to raise funds to complete the work, so that the actual net cost to the committee of completing the contract was $11,995.10. The balance of the fund of $16,994.27 in the city treasury on July 22, 1915, after deducting $1,250 to be retained by the city to fully complete the contract, is, therefore, under the terms of the contract between the city and the committee, applicable to the payment of the persons who performed labor or furnished material to Hager & George and who filed liens. This balance amounts to $3,749.17.

The city has paid to the committee $12,200, so that of this fund applicable to the payment of laborers and materialmen there is in the hands of the city the sum of $3,544.27 and there is in the hands of the committee $204.90. Mr. Schreiber testified that the committee has a balance in bank of $319.12 against which is to be charged the unpaid disbursement of $51.55, leaving a net balance of $267.57.

In addition to the above amounts the committee claimed to be entitled to a trenching machine and

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steam shovel and instituted a replevin action to recover same. In case the committee should realize anything from the trenching machine and steam shovel they would be bound to account therefor to the laborers and materialmen.

That it was the intention of both the city and the committee to subordinate the assignment of April 3, 1915, to the claims of the laborers and materialmen of Hager & George, Inc., is evident from the provisions of section 22 of chapter III of the ordinances of the city of Buffalo which were incorporated in the contract and which read as follows:

"Section 22. In case any Contractor having a contract to perform any public work for the City shall fail to pay any of his employees or laborers engaged or employed on such work, when their salaries or wages become due and payable and written notice shall be given by them to the Commissioner of Public Works, there shall be retained from the next estimate, whether final, or any preceding estimate, made on the work in favor of the Contractor, a sum sufficient to pay such employees or laborers, as shown by such notices, a certified list of which the Department of Public Works shall forthwith file with the Comptroller, and if the Contractor fails to pay such employees or laborers forthwith after the filing of such notices and to notify the Commissioner of Public Works thereof, the Common Council may direct a warrant or warrants drawn to the order of the Treasurer on the fund out of which the work is payable and charge the same to the Contractor; and it is expressly stipulated by the Contractor that the Treasurer, upon the certificate of the Commissioner of Public Works, may with the proceeds of such warrant pay such employees or laborers, on a verified statement of the amounts due each, as

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shown by the books of the Contractor, or upon the statement being verified by the timekeeper or any foreman of the contractor, or, in case any such verified statement cannot be obtained, on the affidavits of the employees or laborers themselves, a receipt must be taken for each payment by the Treasurer and forthwith filed with the Comptroller, who shall charge the same to the Contractor; and it is further expressly stipulated that in no event shall any such sum so retained by the City ever become due or payable to the Contractor under his contract or become subject to any order or assignment previously or subsequently made by him, excepting upon his paying and satisfying the claims of such employees or laborers before the Commissioner of Public Works shall have paid the same as herein provided."

The city was desirous of seeing the claims of both the laborers and materialmen paid. It had the right to pay the laborers, at least, and deduct the amount of their claims from the balance of the contract price, notwithstanding the previous assignment given by Hager & George, Inc., to Hoen. The city, however, did not go to this extent, but insisted that these laborers' claims be paid after the actual cost of completion had been paid, and the city also put the materialmen and subcontractors of Hager & George, Inc., in the same position as the laborers. And in the letters which passed between Mr. Reynolds, deputy building commissioner, and the committee this intention is plain. In the first letter of July fourteenth the committee proposed to accept for their compensation in completing the work "the amount remaining unpaid by the city upon said contracts with Hagar & George, same being the full contract prices plus any extras which may be mutually agreed upon, less allowance of

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$3,750 for change of certain items, also all payments heretofore made to Hager & George and to Mr. Hoen and any undischarged labor liens." On July seventeenth Mr. Reynolds called the attention of the committee to the claim of the McNeil Lumber Company the amount of which was to be retained by the city until the receipted bill should be delivered to the city treasurer. As a result of these letters the contract of July twenty-second was agreed upon. There can be no doubt, therefore, but that the committee by its contract with the city expressly subordinated the Hoen assignment to the liens of laborers and materialmen of Hager & George.

The liens, therefore, of persons performing labor or furnishing material to Hager & George for the contract work are entitled to payment in their respective order of priority to the extent of $3,749.17.

Ordered accordingly.

ALICE F. HALLADAY, Plaintiff, *v.* GEORGE H. WORTHINGTON et al., Defendants.

(Supreme Court, Erie Equity Term, February, 1917.)

Chattel mortgages — filing of — lien of — assignment for benefit of creditors — what does not constitute a fraud on creditors — jurisdiction — evidence — statutes — assignments — judgments.

Neither the omission to file a chattel mortgage executed in good faith as security for a *bona fide* debt nor the mortgagor's retention of possession of the mortgaged property is necessarily evidence of fraud.

A mortgage upon a collection of canceled postage stamps valuable as a curiosity or historical exhibit was given to plaintiff as security for a loan of corporate stock and, in the expectation that its use by defendant would be temporary, the collection was allowed to remain in his possession as he was continually adding to it and he informed plaintiff that as soon

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as he had certain stamps arranged he would send the collection to her, but after his failure to pay the note accompanying the mortgage and before he had made a general assignment for benefit of creditors plaintiff demanded and received possession of the stamps. *Held,* that in the absence of proof of fraudulent intent on the part of plaintiff the mortgagor's retention of the mortgaged property did not constitute a fraud upon his creditors.

An unfiled chattel mortgage is good between the parties and cannot be attacked by creditors of the mortgagor or his assignee for the benefit of creditors until they have executions or attachments or other process under which they can make a levy.

Judgment creditors armed with process and ready to make a levy have no right to levy upon any stamps which defendant had voluntarily delivered to plaintiff to secure or pay his debt to her.

The fact that the law of the state in which the mortgaged property was when the mortgage was made permits an assignee for creditors to contest the right of the mortgagee under an unfiled chattel mortgage, in direct contradiction to the law of the state of New York, is ineffective, as the mortgagor and others having submitted themselves to the jurisdiction of a New York court are governed by New York law as to remedies.

The statutes of both states as to the filing of chattel mortgages and the rights of creditors to take advantage of the nonfiling thereof being the same, the means by which the creditor takes advantage of the nonfiling relates to the remedy and is governed by the *lex fori.*

Where a note evidencing a debt and a chattel mortgage given as collateral thereto represents transactions entered into in good faith by competent parties, the mortgage, though not filed as required by law, is evidence of the transaction actually entered into at the time it was given.

The mortgagor having voluntarily delivered the mortgaged property to plaintiff neither the mortgagor, his assignee for creditors nor any other creditor may question the validity of plaintiff's claim to a prior lien, as, if the mortgage was void under the laws of the state in which it was executed and delivered, it still was evidence of the transaction between the parties and of the promise made and the security pledged, and if merely voidable it had never been legally avoided by any creditor before the mortgagee took possession.

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The Assignment Law of Ohio (General Code, §§ 11104, 11105), being in opposition to the common law and to the law of the state of New York, is not extraterritorial.

Where an act done is valid in the state where the parties are and where the personal property to which said act relates is, it will be held valid in the courts of that state and also by interstate comity in the courts of the other states.

Where the mortgagor's assignee for the benefit of creditors and a committee under agreement took assignments of the collection of stamps subject to plaintiff's lien they cannot dispute the validity thereof.

Such of the stamps as were added to the collection after the mortgage was given to plaintiff and which came into her possession by the defendant's voluntary delivery and not by reason of the mortgage were subject to the lien thereof, and after the satisfaction of her lien the mortgagor and his assignee had an equitable lien on any stamps left and upon all surplus moneys acquired from their sale.

ACTION to establish a lien.

Wallace Thayer (Adelbert Moot, of counsel), for plaintiff.

Kenefick, Cooke, Mitchell & Bass (Daniel J. Kenefick, Fritz Fernow, Harrison B. McGraw), for defendants National Liquidating Company, Harrison B. McGraw, Warren S. Hayden, John F. Hagey and Wilber M. Baldwin.

BISSELL, J. This action has been brought to establish a first lien, which the plaintiff claims to have on the George H. Worthington collection of postage stamps, arising out of the following transaction: On May 7, 1912, the plaintiff was the apparent owner of 1,500 shares of the capital stock of the American Chicle Company, which was then quoted in the market at $225 per share. The defendant George H. Worthington borrowed this stock from the plaintiff, who was

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a friend of himself and his family, for use as additional collateral security for an indebtedness that he had incurred, or was about to incur, to the Citizens Savings and Trust Company of Cleveland, Ohio. At the same time he gave the plaintiff his promisory note, payable at his office in Cleveland "on or before two years from date," for the amount of the then value of the stock, to wit, $337,500; and as security for the note he executed and delivered to the plaintiff a chattel mortgage upon his "collection of postage stamps of the world contained in 60 volumes more or less, and known as the Worthington collection, at present stored in a room in the vault of the Cleveland Trust Company, and in the safe in room 612 Hickox Building, Cleveland, Ohio." The note did not bear interest, but it was expressly agreed between the parties that in lieu of interest during the two years, if the note should be outstanding for that length of time, the plaintiff should receive the dividends on the stock as theretofore, and then amounting to eighteen per cent per annum; and that the stock should remain in the name of the plaintiff on the books of the Chicle Company. The defendant guaranteed the value of the stock at the amount of the note. In compliance with the request of the defendant, who stated to the plaintiff that the filing of the chattel mortgage would be an injury to his credit, it was not filed for record; and the stamps were not at that time removed into the possession of the plaintiff from the vault and safe where they had been deposited for safe keeping.

The Chicle stock was thereafter and on the 6th of May, 1915, sold by the bank to which it had been pledged by the defendant Worthington, and transferred out of the name of the plaintiff, so that she ceased to draw dividends upon it from that time.

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The defendant's note was not paid at maturity, May 7, 1914; and the plaintiff did not get possession of the stamps until a later time, the deliveries of them to the plaintiff beginning September 25, 1914, and continuing until June 28, 1915, when the last delivery was made.

Between the 30th of July, 1915, and the 20th of October, 1916, the plaintiff received in monthly installments upon defendant's indebtedness, either from the sale of stamps of the Worthington collection, or advancements thereon by an agent to whom some of the stamps were intrusted for sale, the aggregate sum of $25,500; but no other payments have been made to her upon the amount due on the note.

The defendant Worthington had been for a period of years possessed of large means, and engaged in important business enterprises which required the borrowing of large sums of money from banking institutions; and by July 30, 1915, his indebtedness had become so great that he was financially embarrassed, and entered into an agreement with the defendants Warren S. Hayden, John F. Hagey and Wilber M. Baldwin, as a committee, the agreement reciting his inability to liquidate his indebtedness, and providing among other things that upon the request of the committee he would transfer to them or their nominees in trust all of his property and all income therefrom "subject to any lien or encumbrance then existing," for the purpose of paying his creditors; and providing further that the committee might require any part or all of the properties of the defendant to be transferred to a corporation to be organized by the committee, and that the committee might exercise through the medium of such corporation the powers delegated to it by said agreement; the agreement further providing that it

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should not become operative and in force until a written declaration to that effect signed by the committee should be mailed to the defendant. On August 17, 1915, the agreement became operative by the service of such notice, and on the following day the defendant executed and delivered to the committee a specific assignment of his entire collection of postage stamps wherever located, but " subject to whatever lien there is thereon upon the part of Alice P. Halladay," the plaintiff. The provisions of the general assignment to the committee of July 30, 1915, had enumerated among the defendant's assets " stamps valued at one million dollars, pledged as collateral to a loan of 1,500 shares of American Chicle Company's common stock to Mrs. Halladay of Buffalo. Par value of note $337,500."

On September 27, 1915, a general assignment under the laws of the state of Ohio was made by the defendant Worthington to the defendant Harrison B. McGraw, of Cleveland, for the benefit of creditors of the defendant Worthington, which deed of general assignment was on that day duly filed in the Court of Insolvency in Cuyahoga county, Ohio.

No suits by creditors seeking money judgments were, or have been, instituted against the defendant in Ohio or elsewhere, nor has any judgment of any kind been obtained against him, and he has not been thrown into bankruptcy under the National Bankruptcy Act.

The defendants other than George H. Worthington, in contesting the plaintiff's claim to a prior lien upon the Worthington collection of stamps, urge that the plaintiff never owned the borrowed and pledged 1,500 shares of the capital stock of the American Chicle Company, and that they at all times belonged to the

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defendant Worthington, his arrangement with the plaintiff in reference thereto being one which simply assured to the plaintiff the dividends upon the stock; and that therefore there was no consideration for the $337,500 note. It appears from the undisputed evidence that the plaintiff became the possessor of these shares of stock not later than the year 1901, and had received dividends upon them from that time until they were transferred to the Citizens Savings Bank upon their sale by the bank as a pledge for the indebtedness of the defendant Worthington; and a careful scrutiny of all of the transactions connected with the care, control and use of this stock from the time the plaintiff became the possessor of it in 1901, until it was sold as a pledge in 1915, fails to disclose any evidence having any probative force whatever that the plaintiff was not herself the absolute owner of the stock, with the right to loan it to the defendant Worthington, as was done by her May 7, 1912, and to receive for such loan the promissory note and chattel mortgage to secure the same, executed and delivered to the plaintiff by the defendant.

The defendants further urge that even if the plaintiff was the owner of the stock there were involved in the arrangement made by her with the defendant Worthington at the time of the taking of the note and chattel mortgage two factors, each of which constituted a fraud upon the defendant's creditors, to wit, the plaintiff's compliance with his request that the chattel mortgage should not be filed, and the retention by him of possession of the collection of postage stamps, after the mortgage upon it was executed and delivered.

It is also claimed by these defendants that there was an oral arrangement made in parol between the

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defendant Worthington and the plaintiff at the time of the giving of the note and mortgage in question, to the effect that while she was to have a mortgage upon the collection he was to retain the right to have for his own purposes therefrom such stamps as he might thereafter wish or desire; but this claim is not sustained by the evidence. Such use as the defendant Worthington made of the stamps for his own benefit after May 7, 1912, was without the knowledge or consent of the plaintiff.

The omission of a mortgagee to file a chattel mortgage executed in good faith as security for a *bona fide* debt is not necessarily evidence of fraud; nor is the retention of possession of the mortgaged property.

There is no proof that the defendant Worthington was insolvent in May, 1912, or was believed or known to be insolvent by the plaintiff either at that time, or when the first deliveries of the stamps were made to her by the defendant in 1914. The loan of the plaintiff's Chicle stock which was made in good faith and pledged to one of the banks as additional security in the course of defendant's financial transactions occurred more than three years prior to the time when the defendant Worthington made his assignment for the benefit of creditors to the defendant McGraw. He was then engaged in a large enterprise, the organization and building of a railroad called the Interurban Railway and Terminal Company of Cincinnati, to assist which the banks were loaning him large sums of money. There was no fraud or fraudulent intent as far as the plaintiff was concerned in withholding from record at the request of the defendant the chattel mortgage given to the plaintiff covering the Worthington collection of stamps, so that injury would not be done to his credit in the circumstances.

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The nature of the mortgaged property was peculiar, being a collection of canceled postage stamps, which the defendant had been collecting since the year 1884, and which had a value as a curiosity or historical exhibit, but not as an article of merchandise that was being dealt in in the business world, or as a dividend paying security. The defendant testifies that he had never thought of being able to use the collection as collateral to his loans with financial institutions. Prior to May 7, 1912, the stamps had never been used by him anywhere as collateral security for a loan, nor were they adaptable for such purpose. It does not appear that they had ever been included by him in any statement of his assets, upon which he had sought or obtained credit in his financial transactions. He required the use of bankable collateral on May 7, 1912, and the plaintiff, believing in its value, was willing to accept the collection as security in return for placing at the defendant's disposal the shares of Chicle stock, which had a distinct market value on that day and was available as collateral security at the banks. The Citizens Savings and Trust Company of Cleveland has had the benefit of the application of the value of this Chicle stock on the defendant Worthington's indebtedness. At the time the stock was loaned by the plaintiff it was expected that its use by the defendant would be temporary, as the railroad enterprise employing the funds at his command would soon be sold, and the Chicle stock released and returned to the plaintiff. It is not unnatural that the plaintiff, a woman, and a friend of the defendant and his family, should have permitted this peculiar pledge to remain in the defendant Worthington's possession for a time after it was pledged to her as security for the payment of the note. At the time of the giving of the note he

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informed her that he was continually adding to the collection, that he had some stamps at that time that were to be arranged and placed in albums, and that as soon as the stamps were properly arranged he would send them to her. She was therefore expecting the delivery of the stamps from the time the Chicle stock was loaned; but after the defendant's failure to pay the note at maturity the plaintiff insisted upon the immediate possession of the stamps, and possession therefore was given to her by deliveries made from time to time as above stated, before the general assignment was executed by the defendant Worthington to the defendant McGraw for the benefit of Worthington's creditors on September 27, 1915. In the circumstances proved, there is no evidence of any fraud or fraudulent intent on the part of the plaintiff in failing either to file the chattel mortgage, or in permitting the defendant Worthington to retain possession of the stamps. No strange or suspicious circumstance has been proved from which such fraudulent intent can be inferred. Under the promise made to her, the plaintiff was willing to leave the collection in the hands of the expert collector who had assembled, was completing and constantly adding to its value, and keeping it safely in a vault especially arranged for the purpose. In the latter part of June, 1914, when the defendant Worthington had defaulted in the payment of his note and the plaintiff became aware that needing funds he undertook to make some sales of the stamps, and to use some of them as collateral, without the knowledge or consent of the plaintiff, she insisted upon possession of the stamps without further delay, and the defendant began delivering them to her.

It is the settled law of the state of New York that an unfiled chattel mortgage is valid between the par-

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ties, and cannot be attacked by creditors or the assignee for creditors, until they have executions or attachments, or other process of the court under which they can make a levy. *Sheldon* v. *Wickham,* 161 N. Y. 500.

Judge Haight, in writing the opinion of the court in that case, says (p. 503): "It has been repeatedly held that such a mortgage is only void as to the persons mentioned in the statute, to wit, purchasers in good faith, and creditors who are armed with some legal process authorizing a seizure of the property, and that it is valid as to the mortgagor and all other persons. The mortgagor, in assigning his property to the defendant Hillis, could not transfer to him any greater right with reference to this property than he theretofore possessed, and if the mortgage was valid as to him, it followed that it was valid as to his assignee. This was expressly held in this court as early as the case of *Van Heusen* v. *Radcliff* (17 N. Y. 580), and the same principle has been since repeatedly asserted in numerous cases. This was the unquestioned condition of the law down to the time of the enactment of chapter 314 of the Laws of 1858. This legislation gave to an executor, administrator, receiver, assignee or other trustee the right to disaffirm, treat as void and resist all acts done, transfers and agreements made in fraud of the rights of any creditor, etc. This statute, with some amendments not material to be now considered, has been incorporated in the Personal Property Law of 1897. It invested assignees with a power which they did not theretofore possess. They were permitted, as the representatives of general creditors, to disaffirm and treat as void, transfers and agreements made in fraud of the rights of creditors, without having such claims established by a judgment.

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But it will be observed that no mention is made in this statute with reference to unfiled chattel mortgages. Unless, therefore, they can be treated as transfers of property in fraud of the rights of creditors, this statute does not effect a change in the law so far as the question under consideration is concerned."

And even though the defendants were or represented judgment creditors armed with process, and ready to make a levy, they would have no right to levy upon any stamps which the mortgagor had voluntarily delivered to the plaintiff to secure or pay her debt. *Stephens* v. *Perrine,* 143 N. Y. 476.

The fact that the law of the state of Ohio permits an assignee for the benefit of creditors to contest the right of a chattel mortgagee under an unfiled chattel mortgage, in direct contradiction to the law of the state of New York, is ineffective in this case for the reason that the forum is in the state of New York and not in the state of Ohio. The defendants, having submitted themselves to the jurisdiction of a New York court, are governed by the New York law as to remedies. *Union Nat. Bank* v. *Chapman,* 169 N. Y. 538; *Hixson* v. *Rodbourn,* 67 App. Div. 424.

The statutes of the two states as to the filing of chattel mortgages, and the right of creditors to take advantage of the non-filing thereof being the same, the means by which the creditor takes advantage of the non-filing relates to the remedy and is governed by the *lex fori.* In order to take advantage of the non-filing of the mortgage the defendants must arm themselves with legal process in this state in a suit against the defendant Worthington, as a preliminary to asserting their rights. Having failed to do so they have not complied with the law of the state in regard to the remedy, and cannot be heard. *Dearing* v. *McKinnon Dash & Hardware Co.,* 165 N. Y. 78.

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The note, and the chattel mortgage given as collateral security to it, represent transactions entered into in perfect good faith by parties competent to enter into them; and therefore the note evidences a debt by the defendant Worthington to the plaintiff, and the chattel mortgage evidences his promise to secure the payment of that debt by giving the plaintiff a lien upon his collection of postage stamps. Although the chattel mortgage was not filed at the time, in accordance with the laws of Ohio, such fact does not take from it its potency as evidence of the transaction actually entered into at the time. It clearly evidences the defendant Worthington's promise to give the plaintiff a lien upon the collection of postage stamps as security for the payment of the amount of the promissory note if he did not return the borrowed stock.

It is undisputed that the Citizens Savings and Trust Company of Cleveland has had the benefit of the plaintiff's stock, and ultimately caused that stock to be transferred to itself upon the books of the Chicle Company, thus legally depriving the plaintiff of the stock, or of any right to retain it, since she had no contract relations whatever with that bank. Before any other creditor legally questioned the transaction between the plaintiff and the defendant Worthington, as appears by the undisputed evidence, the defendant delivered the postage stamps to the plaintiff; most of them prior to May, 1915; and on May 20, 1915, he wrote a letter to Mr. Colson, the selling agent in Boston, to recognize the plaintiff as the owner of the stamps in his possession, and to account to her therefor. The plaintiff wrote a similar letter to Mr. Colson in June, 1915, and from that time Mr. Colson recognized the plaintiff as the person entitled to the possession of the stamps that had been sent to him, or to the proceeds of such sales

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as he should make therefrom. It is true that Mr. Colson had advanced a sum of money to the defendant Worthington upon the stamps before he was informed as to the lien possessed by the plaintiff upon them, and that he afterwards reimbursed himself for those advances from sales that he made. But what Mr. Colson did in this regard before he was directed to treat the plaintiff as the person entitled to the possession of the stamps can in no way affect her rights, nor can what he did without her express assent as between himself and the defendant Worthington affect the rights of the plaintiff, as the defendant Worthington's creditor. The other creditors of the defendant Worthton having failed to legally question the transaction between him and the plaintiff by any action or proceedings previous to the general assignment to the committee on July 30, 1915, or to the defendant McGraw under the Ohio statute on September 27, 1915, at which time the plaintiff was in complete possession of the collection of stamps, through their voluntary delivery by the defendant Worthington, neither the defendant, as assignee, nor any other creditor, or representative of a creditor, of the defendant Worthington, can now and here question the validity of the plaintiff's claim to a prior lien upon the collection.

Whether this security was held under a mortgage, or by way of a pledge, is unimportant. The vital fact is that at the time the transaction was entered into the party parting with her property did so upon the faith of a promise by the other party that she should have a lien upon specific property as security for what she parted with. If we regard the mortgage as void under the laws of the state of Ohio, it is nevertheless evidence of the transaction entered into, and of the promise made, and of the security pledged. If we regard the

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mortgage as merely voidable in the circumstances it is nevertheless true that it has never been legally avoided by any creditor, or the representative of any creditor, and the plaintiff having obtained possession of the property promised as security thereunder before the mortgage has been avoided by any creditor, or the representative of any creditor, and such possession having been obtained by the plaintiff with the consent of the defendant Worthington, who executed the mortgage, it follows within the chattel mortgage cases in the state of New York and within the decision of the United States Supreme Court (*Sexton* v. *Kessler,* 225 U. S. 290) that the plaintiff can hold that possession as against the world, whether we regard the possession as founded upon a chattel mortgage voidable, but not void; or whether we regard the possession as due to a pledge, because the chattel mortgage was rendered void by statute. The defendant Worthington was willing to make the promise good by pledging the collection of stamps to the plaintiff. In *Stephens* v. *Perrine, supra,* the court by Judge Peckham says: "If, before any lien had been acquired by the creditors, the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it because it would have been in such a case a transfer of property by them in payment of their debt, and although it would have been in fact preferring such debt, yet it would have been a preference which the mortgagors then had the right to make." See, also, *Tremaine* v. *Mortimer,* 128 N. Y. 1; *Bowdich* v. *Page,* 153 id. 104.

The pledge and transfer of the collection to the plaintiff would not be invalidated under the Assignment Law of Ohio, sections 11104 and 11105, assuming that this law applies to the case at bar, for the reason

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that they were made in payment of a *bona fide* debt, which had no relation to a contemplated insolvency of the defendant Worthington, or a design to prefer the plaintiff as a creditor, to the exclusion of other creditors, in so far as the plaintiff had knowledge of the circumstances. *Hunt* v. *Bode,* 66 Ohio St. 255. But this statute of Ohio is in opposition to the common law and to the law of the state of New York, and is not extraterritorial Where the act done is valid in the state where the parties are, and where the personal property is, it must be held to be valid in the courts of that state, and also by interstate comity in the courts of the other states.

Moreover, the defendants who are contesting the plaintiff's claim, having taken an assignment of the stamps expressly subject to the plaintiff's lien, cannot now dispute the validity of it. It appears that the first assignment made to the committee under the agreement of July 30, 1915, was made subject to whatever lien there might be on the collection upon the part of Alice F. Halladay, and the assignment thereafter made to the defendant McGraw as assignee, pursuant to the laws of the state of Ohio, was also made expressly subject to Alice F. Halladay's lien.

The defendant Worthington undertook to assign and the other defendants undertook to take only subject to this lien; and taking subject to the lien they could not and cannot dispute the validity of the lien. *Hartley* v. *Harrison,* 24 N. Y. 170; *Cottle* v. *County of Erie,* 57 App. Div. 443.

It appears that $25,000 worth of stamps were added to the collection after the mortgage was given to the plaintiff, and the defendants claim that these stamps are in no way subject to any lien or claim on the part of the plaintiff, and that as they are so mixed with the

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other stamps as to be impossible of identification the defendant McGraw as assignee has an equitable lien on the entire stamp collection to the extent of $25,000. It is presumable that some of the stamps purchased by the defendant Worthington subsequently to the mortgage came into the possession of the plaintiff when she got the albums between September 28, 1914, and June 28, 1915; but these subsequently purchased stamps and the stamps covered by the chattel mortgage are alike subject to her lien, because her lien depends upon a voluntary delivery by the defendant Worthington to her, and not upon the chattel mortgage. It is therefore unimportant whether they are or are not covered by the chattel mortgage. The stamps delivered to Mr. Colson which have come into the hands of the plaintiff, and the stamps purchased prior to June 28, 1915, which have come into the possession of the plaintiff, were delivered under the pledge evidenced, as hereinbefore set forth, by the giving of the chattel mortgage. Any stamps purchased since the 28th day of June, 1913, have not come into the possession of the plaintiff, and are therefore not involved in the consideration of the question presented. No distinction should be drawn between the $25,000 worth of subsequently acquired stamps which were delivered to the plaintiff prior to June 28, 1915, and all the rest of the collection. The defendants have an equitable lien subsequent to the plaintiff's lien on all of the stamps left after her claim has been satisfied by their sale, and upon all surplus moneys acquired from their sale.

It follows from the discussion of the facts and the law applicable to this case that the plaintiff is entitled to a judgment against the defendant Worthington in the sum of $337,500, less the sum of $25,500 paid thereon, with interest on all sums unpaid from May 6,

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1915, and the costs of this action; and that the judgment shall provide for a first lien upon all of the stamps belonging to the defendant Worthington which are in the possession of the plaintiff, being the entire Worthington stamp collection; and that said stamps shall be sold by the plaintiff in accordance with the rules of law and practice of this court in the case of a foreclosure of chattel mortgages or pledges; and that such sale be public, and to the highest bidder, after giving the notice as required by law of the time and place of said sale; and that the plaintiff shall have a deficiency judgment for the amount still owing against the defendant Worthington in the event that enough is not realized from such sale to pay the plaintiff's claim, with interest, costs, and the expense of the sale.

Judgment accordingly.

IVA COLLY, by Guardian, Plaintiff, *v.* ANTHONY THOMAS, Defendant.

(Supreme Court, Erie Trial Term, February, 1917.)

Damages — for seduction — when promise to marry will not defeat a recovery — trial — actions.

Where defendant admits that on a number of occasions he had illicit sexual intercourse with plaintiff when she was under eighteen years of age she is entitled to recover damages for the seduction, and an allegation that defendant accomplished his purpose by a promise of marriage will not defeat a recovery.

A charge to the jury that if plaintiff was under eighteen years of age and defendant had sexual intercourse with her as admitted, a cause of action was made out and she was entitled to recover is not erroneous though defendant denied the promise to marry plaintiff.

MOTION for a new trial after a verdict by a jury in favor of the plaintiff.

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Thomas E. Boyd and John Duchmann, Jr., for plaintiff.

William C. White and Wallace Thayer, for defendant.

WHEELER, J. The action was brought to recover damages for a seduction of the plaintiff by the defendant under an alleged promise of marriage.

It is unnecessary in this opinion to detail all the facts and circumstances developed on the trial, attending the seduction of the plaintiff. For the purposes of this motion, it is sufficient to say that the defendant admitted he had taken the plaintiff, a young girl of about sixteen years of age, to a rooming house in the city of Buffalo, and there had had illicit sexual relations with her on a number of occasions.

The complaint alleged that the defendant had accomplished his purpose by a promise of marriage. The making of any such promise the defendant denied.

The court nevertheless charged the jury that if the plaintiff was under eighteen years of age, and the defendant had sexual intercourse with her as admitted, that a cause of action was made out, and the plaintiff was entitled to recover.

To this instruction defendant's counsel took exception.

The main question, therefore, is, did the trial court err in the instructions given.

Section 2010 of the Penal Law provides that: "A person who perpetrates any act of sexual intercourse with a female, not his wife, under the age of eighteen years, * * * is guilty of rape in the second degree."

This provision fixes the age of legal consent under the law of this state, and until the age of eighteen has

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been reached, a woman is incapable of legal consent to sexual intercourse.

Section 1743 of the Code of Civil Procedure authorizes the bringing of actions to annul a marriage where "one or both of the parties had not attained the age of legal consent."

Section 1744 authorizes such an action to be maintained by the infant, or by either parent of the infant, or by the guardian of her person.

It will thus be seen that the statute which the defendant confesses violating was enacted not only for the protection of the public, but for the benefit and protection of those members of the community whose inexperience and lack of mature judgment would not sufficiently protect and guard them against the wiles of designing and unscrupulous men.

We are of the opinion, therefore, that the violation of the Penal Law of the state gave the plaintiff a cause of action against the defendant.

It is not necessary that that statute expressly give a civil remedy for its violation in addition to the criminal punishment prescribed. Judge Cooley, in his work on Torts (3d ed.), lays down the general rule which obtains in such cases, as follows: "When the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of duty, will supply a remedy, if the statute gives none." 1408.

At page 1401, the same learned writer says: "If the duty imposed by statute is obviously meant to be a duty to the public, and also to individuals, and the penalty is made payable to the state, or to an informer, the right of the individual injured to maintain an action on the case for a breach of duty owing him is unquestioned." Citing numerous cases.

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Section 1899 of the Code of Civil Procedure expressly declares that: "Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other.

Under the common law a woman seduced could not maintain an action herself against her seducer. *Graham* v. *Wallace,* 50 App. Div. 102, and cases cited.

There are, however, certain recognized exceptions to the general rule, as where the seduction is accomplished under promise of marriage, or brought about by force or threats. *Brown* v. *Kingsley,* 38 Iowa, 220; *Dean* v. *Raplee,* 145 N. Y. 319; *Ayer* v. *Colgrove,* 81 Hun, 322.

The theory of the old common law was that by consenting to the seduction the woman was barred from maintaining an action for the wrong done. Therefore it was that in the case of minors the law permitted parents and guardians to maintain actions against wrongdoers for the loss of services of the minor. The theory of loss of services was largely a legal fiction, for in such actions damages might also be awarded by way of compensation for wounded feelings, mental suffering, destruction of domestic peace, and shame and disgrace cast upon him and his family.

When, however, we come to consider this case, we find that by the provisions of the Penal Law the age of consent has been raised to eighteen years, and until that age has been reached a female is, by law, incapable of legal consent to sexual intercourse, and it is declared "rape" for a person to have intercourse with a woman under eighteen, whether voluntary on her part or not. In contemplation of law, such a consent on the part of one under eighteen is no consent. *Graham* v. *Wallace,* 50 App. Div. 101–108.

The above case is quite in point. There the right of an infant to maintain an action against her guardian,

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for seduction, in her own right was sustained; the court holding that by reason of the trust relation which the guardian sustained toward his ward he owed her such a duty that he could not take advantage of her consent to have illicit relations with her. The court said: "The ward cannot waive performance of this duty or surrender these rights of protection. When the guardian thus betrays his trust and ruins the morals, the character and reputation of his ward, he should not be heard to say in a court of justice, by way of legal excuse or justification for the seduction, that the ward was capable of consenting. *Consent obtained under such circumstances is no consent and should stand for naught.* It is essential to the preservation and enforcement of the ward's right of protection in her chastity and virtue that a violation of this right by her guardian should not pass with impunity, but that it should be vindicated and the seducer punished on the civil as well as on the criminal side of the court."

We think the case above cited, although somewhat different in its facts, fully sustains the correctness of the charge of the court given the jury in this case.

As was said by Vann, J., in *Kujek* v. *Goldman,* 150 N. Y. 178: "While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been occasion to make one."

The defendant in this case was confessedly guilty of rape. Judge O'Brien said in *Dean* v. *Raplee,* 145 N. Y. 324, referring to cases of this character, and of the

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right of the seduced to maintain actions for wrongs thus sustained: "There are cases that seem to hold that a civil action of this kind based upon a charge such as is set forth in the complaint in this action may be maintained upon evidence such as might not be sufficient to warrant a conviction upon a criminal charge of rape * * *. The principle was necessarily involved in the case of *Young* v. *Johnson* (46 Hun, 164), which was affirmed in this court (123 N. Y. 226)." See also the opinion rendered in the above case in the General Term, by Mr. Justice Bradley. *Dean* v. *Raplee*, 75 Hun 389.

Here the case presented is admittedly one of criminal assault or rape.

We think the courts should be zealous to protect the rights of young and inexperienced girls placed as the plaintiff was, and to sustain actions for such wrongs in the interest of right and justice, and that the defendant should not escape liability for his acts by appeal to an ancient fiction of the law which we have seen should have no application to the facts and conditions of the law as it now stands.

The argument is made by the defendant that the allegations and theory of the complaint are that the plaintiff's seduction was obtained by means of a promise of marriage, and therefore the plaintiff ought not to be permitted to recover upon any other theory. Nevertheless, if the plaintiff is entitled to recover upon the theory outlined in the foregoing opinion, all the essential facts for such a recovery are stated in the complaint; and, in our opinion, the fact that the complaint alleges the additional fact of a promise to marry cannot and ought not to defeat a recovery.

For these reasons, the defendant's motion for a new trial is denied.

Motion denied.

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Matter of Proving the Last Will and Testament of FREDERICKA O. HAAG, Deceased.

(Surrogate's Court, Bronx County, February, 1917.)

Executors and administrators — when refusal of letters testamentary to executor named in will not justified — wills — Code Civ. Pro. § 2565.

Upon an application for the refusal of letters testamentary to the executor named in the will on the ground that he is not entitled to serve by reason of incompetency and dishonesty within the intent and meaning of the law, in that he was required to account in an interlocutory judgment for moneys and property collected by him and that he had failed so to do and that he had intermingled his own funds with those of the decedent,

Held, that a refusal of letters is not justified when the person nominated as executor in the will is indebted to the testatrix at the time of the latter's death; that it is no trivial matter to refuse letters testamentary to a person duly nominated, and that the will having been admitted to probate the person therein nominated as executor has a right to have letters issued to him and he should not be deprived of his right unless it clearly appears that he is incompetent on the grounds of disqualification enumerated in the Code or that the facts stated in section 2565 exist and the surrogate exercises his discretion adversely to him.

MOTION under section 2566 of the Code of Civil Procedure for an order refusing letters testamentary to an executor named in a will.

James R. Bowen, for Gustav Wenzel et al., for the motion.

Harold S. Walton (Arthur Furber, of counsel), for executor, opposed.

SCHULZ, S. Some of the persons interested in the estate of the decedent ask for a determination by this

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court refusing letters testamentary upon her last will and testament, to the executor therein named.

The will of the decedent was contested and after a jury trial of certain controverted questions of fact was admitted to probate. The respondent is entitled to letters testamentary thereunder, unless for some reason prescribed by statute he is incompetent to receive the same. Section 2564 of the Code of Civil Procedure specifies the persons who are incompetent to receive letters. The section, so far as material to this controversy, provides as follows: "No person is competent to serve as an executor, administrator, testamentary trustee or guardian, who is: * * * 5. Incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding."

The petition upon which the application is based states as the ground for refusing such letters that the respondent is incompetent to serve by reason of dishonesty within the intent and meaning of the law. The alleged act of dishonesty is stated to be that on or about the 28th day of January, 1916, by an interlocutory judgment of the Supreme Court, Bronx county, in an action brought by the committee of the testatrix who was an incompetent at that time, against the respondent, the latter was required to account for certain moneys and property of the decedent collected by him and that he failed so to do. It is further alleged that the referee appointed by the court had ordered and directed the respondent to file an account within a certain time and that such account was never filed.

An examination of the papers discloses the fact that the interlocutory judgment referred to was made upon the consent of the respondent. He explains his failure to file the account by stating that the incompetent died

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before the date upon which he was to file it and that the proceeding brought by the committee of the incompetent thereby abated. It cannot be questioned that the power of the committee to proceed with the action ceased upon the death of the testatrix. Code Civ. Pro. § 2344; *Matter of Forkel,* 8 App. Div. 397; *Carter* v. *Beckwith,* 128 N. Y. 312, 320.

In the memorandum submitted by the petitioners they also urge as a ground for refusing letters that the respondent being the attorney of the decedent intermingled her funds with his own and that this constitutes such an act of dishonesty as to disqualify him from receiving letters and ask that a hearing be accorded so that they may offer evidence on this point. I am of the opinion that even if this fact were proved it would not of itself constitute dishonesty as used in the section cited. Such being the case, it is not necessary to have a hearing on that proposition.

At first glance it would appear perhaps that there is something anomalous in having as the executor of this estate the person who was the defendant in the action brought by the committee. As was argued by the counsel for the petitioners, if the action survived he might be the sole plaintiff in his representative capacity and the sole defendant in his individual capacity which would be absurd; or if the action did not survive he might be in the position where as the personal representative of the deceased it would be his duty to bring an action against himself as an individual which would be equally absurd. It must be remembered, however, that as the executor of the decedent's will it will be his duty to file an inventory (Code Civ. Pro. §§ 2665–2669), and to account for all the moneys and property of the decedent which have or hereafter may come into his possession. Code Civ. Pro. § 2726. In

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the accounting proceeding all the parties who now oppose the issuance of letters to him will have an opportunity to be heard and all of the matters which might have been considered and litigated in the accounting action brought in the Supreme Court may be as fully litigated and determined in the accounting proceeding. *Killick* v. *Monroe County Savings Bank,* 1 N. Y. Supp. 501. I can find no authority holding that a refusal of letters is justified when the person nominated as executor in a will is indebted to the testatrix at the time of the latter's death. In fact, the authorities are the other way. *Churchill* v. *Prescott,* 2 Bradf. 304; *Matter of Morgan,* 2 How. Pr. (N. S.) 194; *Matter of Bennett,* 60 Misc. Rep. 28; *Matter of Brinckmann,* 89 id. 41.

The will having been admitted to probate, the person therein nominated as executor has a right to have letters issued to him. This right he should not be deprived of unless it clearly appears that he is incompetent under the Code sections cited above, or that the facts stated in section 2565 exist and the surrogate exercises his discretion adversely to him. *McGregor* v. *McGregor,* 1 Keyes, 133. It is no trivial matter to refuse letters testamentary to a person duly nominated in a valid last will and testament *Matter of Latham,* 145 App. Div. 849, 854. In this case it would involve a finding that the respondent is dishonest. Nothing in the papers before me warrants such a finding; nor would I be willing to base it upon absolute proof of the facts not stated in the papers but urged in the brief of the petitioners.

It follows that the application must be denied, and letters issued accordingly. No costs.

Decreed accordingly.

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Matter of the Application for Letters of Administration upon the Goods, Chattels and Credits of JOSEPH MANDELKORN, Deceased.

(Surrogate's Court, Bronx County, February, 1917.)

Attorneys — substitution of — executors and administrators — motions and orders — Surrogate's Court.

Upon denying a motion made by an administrator for an order directing a substitution of attorneys,

Held, that an order substituting one attorney for another is merely an incident in the progress of a cause and no such order can be made by this court when no cause is pending to which such order could relate; that in a subsequent proceeding for the revocation of letters of administration the petitioner had the right to be represented by any attorney he desired, other than the one who acted for him in the administration matter.

MOTION by an administrator to procure the substitution of attorneys.

Ingram, Clark, Taylor & Schenck, for administrator, for motion.

SCHULZ, S. The administrator of the goods, chattels and credits of the decedent applies for an order directing a substitution of attorneys. The matter in which the attorney whose substitution is sought appeared for the petitioner was the proceeding brought by the latter to obtain letters of administration upon the decedent's estate. On that application a final decree was entered on the 5th day of December, 1916, and letters of administration were thereafter duly issued out of this court. That proceeding was thereby closed.

It has been held that an order substituting one

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attorney for another is merely an incident in the progress of a cause and no such order can be made by a court in which no cause is pending to which such order can relate. *Matter of Krakauer*, 33 Misc. Rep. 674, citing *Matter of Hoyt*, 5 Dem. 432, 445.

At the time of the application for such substitution, there was pending in this court a proceeding for the revocation of the letters of administration that had been granted to the petitioner. This was a new proceeding entirely independent of the one which resulted in the grant of letters of administration. Code Civ. Pro. § 2569. In that matter the petitioner had the right to be represented by any attorney he desired and has in fact appeared in court by attorneys other than the one who acted for him in the administration matter.

The order prayed for is therefore unnecessary and the application is denied.

Motion denied.

Matter of the Judicial Settlement of the Accounts of JESSIE SHEPKENS VON RIMPST, as Executrix, etc., of ELIZABETH F. TERRY, Deceased.

(Surrogate's Court, Columbia County, February, 1917.)

Wills — construction of — trusts — intention of testatrix — specific legacies — meaning of "nephews and nieces."

The expression "nephews and nieces," in a will will be construed to include "grandnephews and grandnieces" when necessary to effectuate the intention of the testatrix.

At the making of the will of a testatrix who left an estate of about $20,000 she had two brothers living, nine nephews and nine nieces living and there were three children of a deceased nephew. She also had a grandniece, who was her namesake, whose parent was living, and by said will testatrix gave an

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absolute specific legacy of the same amount, with two exceptions, to each of her nephews and nieces, to each of the children of the deceased nephew and to the namesake and also a small gift to a stranger. She also created a trust in favor of each brother and gave him the income thereof during his life. Each of the provisions creating a trust disposed of the principal fund upon the death of the brother by dividing it among the "nephews and nieces, who shall then be living, share and share alike," and all the remainder of the estate was devised and bequeathed to the nephews and nieces in equal shares. *Held*, that as from the amounts of the specific legacies as compared with the residuum it was apparent that testatrix intended to distribute her estate in the main through the residuary clauses including the principal of the trust fund and used the specific legacies as a means of making such distinctions among her beneficiaries as she desired, and as in view of the fact of the size of the estate the small amount provided for each of the children of the deceased nephew by way of specific legacy would show a strong tendency towards substantial disinheritance, if the testatrix did not intend them to share in the balance of the estate remaining after satisfying the specific legacies, the testatrix intended to include among the "nephews and nieces" who would share in the residuary estate, including the principal of the trust funds, the children of her deceased nephew, and they took their respective shares *per capita*.

CLAIM by the children of a nephew of the decedent to be included in the class of nephews and nieces, and to share as such in the residuary estate.

Coffin & Coffin, for executrix.

John V. Whitbeck, Jr., for claimants.

MCNAMEE, J. and Acting S. Sanford G. Hoysradt, Caroline Whitbeck and Gertrude McE. Whitbeck make claim on this accounting to a share of the residuary estate by reason of the provisions of the will of the deceased, and contend that the testatrix intended to include them as residuary legatees when she used the

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terms "nephews and nieces," notwithstanding the fact that they are children of a nephew.

In reaching a decision in this case the court has held before it the accepted principles of construction, viz., that the expression "nephews and nieces" does not include "grandnephews and grandnieces," unless there is something in the will to show that the words were used by the testatrix in the broader sense; and also that, in the construction of wills, words are to be given their primary meaning unless it is necessary to resort to a secondary meaning to effectuate the intention of the testatrix as gathered from the will as a whole.

In so far as the 13th clause of the will is concerned, and in so far as the 11th and 12th clauses dispose of the principal of the trust funds, when read separately, or when these three clauses are read together, there is no ambiguity in the language employed. The difficulty in determining the intention of the testatrix arises only in the reading of these clauses in connection with the other parts of the will, in studying its plan and purpose, and in considering the family relations of the decedent. And in view of the general import of the will I believe consideration should be given to the family relations of the testatrix at the time the will was made.

When the will was made the testatrix had two brothers living, nine nephews and nine nieces living, and one deceased nephew who left three children, the three claimants above named. She also had a grandniece who was her namesake, whose parent was living. The testatrix gave an absolute specific legacy to each of these nephews and nieces, to each of the children of the deceased nephew, and to the namesake aforesaid. She also created a trust in favor of each brother,

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and gave him the income thereupon during his life.

Each of the provisions creating a trust disposed of the principal fund upon the death of the brother by dividing it among the "nephews and nieces, who shall then be living, share and share alike." And the residuary clause, the 13th of the will, was as follows: "All the rest and residue of my estate I give, devise and bequeath to my nephews and nieces to be divided between them in equal shares."

From a study of the will it appears that the testatrix planned and purposed to distribute the bulk of her estate to her next of kin. She made what were comparatively ample provisions by way of life estates for the two brothers living when the will was made and then bestowed her bounty by way of specific bequests of small amounts of money on each living nephew and niece and the descendants of the one relative of that degree who had died. These are the persons who would take her estate if there were no will. The only exceptions were a small gift to a stranger and a gift to her namesake designated a grandniece; and this is the only time the term "grandniece" appears in the will, and the latter gift was the only bequest made to a relative who was not one of the next of kin.

The 3d clause of the will is the first to contain a bequest to relatives, and in this clause she makes provision for the "children of my nephew Albert Hoysradt," and in the next or 4th clause she provides for one niece specially favored in the amount of the specific legacy given. In the next and 5th clause she remembers her namesake and designates her "my grandniece;" in the next or 6th clause she bequeathes equal sums to seven nieces, designated as such, and in the next and 7th clause she bequeathes like sums to

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nine nephews, designated as such, and in the next or 8th clause, in conjunction with a bequest to a stranger, she bequeathes a like sum to the remaining living niece, without reference to her relationship.

In conferring her benefactions upon this large number of nephews and nieces and the family of the deceased nephew, all the specific bequests are in the same amount, with two exceptions, viz., those to the children of the deceased nephew, and Inda McArthur. She gives to each of the children of the deceased nephew thirty-four dollars less than she gives to each nephew or niece, other than Inda McArthur, by way of specific legacy, and the combined legacies to the three children of the deceased nephew is substantially the same amount given to the specially favored niece Inda McArthur. Thus the children of the deceased nephew together, and Inda McArthur, each receive about two and one-half times as much as any other niece or nephew by way of specific legacy. And if the children of the deceased nephew are allowed to share in the residuum, and take their shares *per capita*, the combined amounts which they will receive from the residuary estate will not be greatly more disproportionate with reference to the other shares therein than were their combined specific legacies with reference to the specific legacies to the nephews and nieces, other than Inda McArthur.

It is apparent from the amounts of the specific legacies as compared with the residuum that the decedent intended to distribute her estate in the main through the residuary clauses, including the principal of the trust funds, and that she used the provisions for specific legacies as a means of making such distinctions among her beneficiaries as she desired to make. And in view of the fact that the decedent had an estate of

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about $20,000, the small amount provided for each of the children of the deceased nephew by way of specific legacy would show a strong tendency toward substantial disinheritance, if the testatrix did not intend them to share in the balance of the estate remaining after satisfying the specific legacies. The courts do not look favorably upon a construction which tends to the disinheritance of those who would take without a will; and the arrangement, plan and evident purpose of the will are opposed to the theory that the testatrix had any intention to disinherit or substantially disinherit any of her next of kin, and, on the contrary, evidence an intention that none of her next of kin shall be substantially disinherited.

So reading the will as a whole it is held that the testatrix intended to include among the nephews and nieces who would share in the residuary estate, including the principal of the trust funds, the children of her deceased nephew, Albert Hoysradt, and they will take their respective shares *per capita.*

Decreed accordingly.

Matter of the Petition of JACOB D. H. BERGEN and DE HART BERGEN, to Render and Settle Their Account as Surviving Trustees under the Will of SEBA M. BOGERT, Deceased; JOHN W. BOGERT, Trust.

(Surrogate's Court, Kings County, February, 1917.)

Wills — provisions of — trusts — executors and administrators — when interest remains vested — distribution.

Testator at the time of the making of his will had a son and a daughter neither of whom was childless and at testator's death the son had three children and the daughter four. The

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will provided: "All the rest, residue and remainder * * * I direct my executors to divide into two equal parts and one of said parts I give to my executors in trust to hold and invest and keep invested, and to collect the rents, issues and profits thereof and to pay the same semi-annually to my son John W. Bogert during his life, and from and after his death, I give the principal and any accumulated income of said trust fund to the descendants of my son John W. Bogert *per stirpes* and not *per capita*. In making division of the remainder of said trust fund after the death of my said son John, I direct that it shall be so divided that the share of my grandson, Andrew F. Bogert, shall be less than the shares of the other children of my said son John by the amount then due upon a loan of five thousand six hundred and fifty dollars made by me to my said grandson and now unpaid." Testator's son died after him, leaving him surviving two of his children who claimed the whole of the principal of the trust fund, and the administratrix of another child of said son, who after testator's death and before the death of his father died without issue, claimed the share of the trust fund to which her intestate if living would have been entitled. *Held*, that as the will of testator contained no disposition in case of a death without issue the interest of said grandchild remained vested and passed to his representatives, and that the trust fund was payable to the surviving children of testator's son and to the administratrix of the one dying without issue in proportions which remain for adjustment.

That the gifts were in common and would be in equal thirds except for the burden placed upon the share of Andrew which must be one-third of the fund less the amount due on the loan to him by testator, and when said share to Andrew has been ascertained by the deduction of the amount of his obligation the sum so retained is not to be added to the shares of the other children but remains undisposed of and must be distributed as if testator had died intestate.

PROCEEDING upon the petition to render their account as surviving trustees.

Frank G. Wild, for accounting trustees.

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Elfers & Abberly, for Josephine I. Ackerman, as administratrix of Charles S. Bogert, deceased.

Francis B. Mullin & Bro. (Edwin Kempton, Jr., of counsel), for Andrew F. Bogert and Kitty L. King.

KETCHAM, S. The paragraph of the will requiring construction is the following:

"All the rest, residue and remainder * * * I direct my executors to divide into two equal parts and one of said parts I give to my executors in trust to hold and invest and keep invested, and to collect the rents, issues and profits thereof and to pay the same semi-annually to my son John W. Bogert during his life, and from and after his death, I give the principal and any accumulated income of said trust fund to the descendants of my son John W. Bogert *per stirpes* and not *per capita.* In making division of the remainder of said trust fund after the death of my said son John, I direct that it shall be so divided that the share of my grandson, Andrew F. Bogert, shall be less than the shares of the other children of my said son John by the amount then due upon a loan of five thousand six hundred and fifty dollars made by me to my said grandson and now unpaid."

The next paragraph of the will, referred to only for its reflex effect upon the provision requiring attention, gives the other one-half of the residuary estate in the same form of words employed in the 5th paragraph to a daughter, Mary, for life, and to her descendants *per stirpes.*

At the time of the testator's death, the son named in the 5th paragraph had three children, and the daughter named in the 6th paragraph had four children. Neither of the testator's two children was childless at the time when the will was made.

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The life beneficiary named in the 5th paragraph died after the testator's death, leaving him surviving two of his children, Andrew and Kitty. The life tenant had another child, Charles, who, after the testator's death and before the death of his father, died without issue.

The administratrix of Charles claims the share of the trust fund to which Charles, if living, would have been entitled. The two surviving children of the life tenant claim the whole fund.

Whatever may be the normal meaning of the word "descendants," one thing clearly shown in this will is that in the bright lexicon of the testator this word is so defined as to include the children of the life tenant and the grandchildren of the testator. It is equally clear that the word "descendants" not only stood in the mind of the testator for the children of the life beneficiary but was extended by the use of the words *per stirpes* to the children of deceased children. That the gift over primarily contemplated children of the life tenant appears in the sentence with which the 5th paragraph closes. "In making division * * * the share of my grandson Andrew shall be less than the shares of the other children of my son John," etc. The interpretation must be as if the testator said: "When I make a gift to John's descendants, I want that gift to go in the first instance, if possible, to the kind of his descendants who are known as his children."

As stated *supra* both of the children who were named as primary beneficiaries had children at the time when the will was made.

The testator, therefore, must have contemplated the instant existence of two classes of John's descendants, viz., his children and his more remote descendants.

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Where a testator so impressed makes a gift to his descendants qualifying the word by the addition "*per stirpes*," it would seem that the gift was consciously designated for such descendants as might be of equal degree or in the event of the death of any one of them was with equal intention passed on to such descendants as would take the place of the deceased one, representing him by stock and taking that which he otherwise would have taken.

This interpretation so far as it is affected by the qualification "*per stirpes*" is aptly supported by the decision in *Matter of Weinholz*, 94 Misc. Rep. 56. There the language of the will, after a disposition of a life estate to a son, was as follows: "Upon his [the life tenant's] death, I give and devise said real and personal property to the lawful issue of my said son, to be divided among said issue *per stirpes*," and there Mr. Surrogate Fowler, in an opinion interesting in its brevity and precision, held that the word "issue" was used in its primary sense of descendants generally, that the direction for the disposition among such issue *per stirpes* showed that the testatrix contemplated a possible decease of some of the children of her son, the life tenant, before the time of distribution should arrive, and intended by the use of these words (*per stirpes*) that the share of the child so dying should go to his or her children, and that the direction for disposition among the issue *per stirpes* manifested an intention that the issue of any of the children of the life tenant who died before him should take the parent's share.

In *Staples* v. *Mead*, 152 App. Div. 745, there was a trust to pay the income to the testator's wife and others during the life of the wife, and upon the death of the wife to pay the income, one-half to a daughter and one-half "unto my grandchildren living at my

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death and to the issue of any grandchildren who may have died leaving issue, share and share alike. * * * and upon the death of my said daughter * * * unto my grandchildren and to the issue of any grandchild who may have died leaving issue equally *per stirpes* and not *per capita* share and share alike."

A grandchild, one of eleven children of the testator's daughter, died during the life of the testator's wife, without issue. Thereafter, during the life of the daughter question arose between the representatives of the deceased grandchild and the surviving grandchildren as to the disposition of the income which had been payable to the deceased grandchild. It was held that all the grandchildren took vested remainders, that the death of a grandchild before his mother, leaving issue, was a contingency upon which his estate might be diverted and vested in his issue, but that this was not an overt event upon which the vesting in him depended, and that since the only event upon which his estate could be divested did not come to pass his gift was not defeated but remained vested. The court thereupon determined that the whole income upon the share (so called) of the deceased grandchild belonged to his executors. This result was reached in the absence of any provision in the will for the payment of the income in dispute to any person or persons whatever upon the death of a grandchild without issue. It rested solely upon the finding that the grandchild died possessed of a vested estate in the principal fund, limited to him upon the death of the second life tenant, and that by reason of such vesting his estate in remainder passed to his representatives and the income thereof undisposed of in the will belonged to such representatives only as the persons presumptively entitled to the next eventual estate.

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No distinction can be inserted between this decision and the case at bar. True, the subject matter there was the income, while here the principal in remainder is involved but, as shown *supra*, the award of the income in the case cited to the grandchild's estate was based wholly upon the precedent adjudication that he died with a vested interest in the principal.

It is sought to divert the force of this authority by the suggestion that its rule controls gifts over to children, issue or descendants of the testator but has no relation to remainders limited to the lawful relatives of a life tenant. No judicial recognition of this variation has been cited or found, but in any event the will before the court describes the remaindermen by their relation to the testator.

Future estates limited upon a life and devised over to the issue, children or descendants of the life tenant may well be contingent. They would not be if the remaindermen were indicated by expressions such as "my grandson Andrew," "the grandson who owes me money," and "the other children of my son John." Such nomination or description equivalent to nomination would not lend support to a conclusion that the gifts were to a class to be wholly determined at the end of the life estate, even if the beneficiaries were also mentioned as the relatives of the life tenant. Nor in such case would the conclusion be encouraged by the declaration that the share of a named legatee was to be lessened by the amount of a loan which he had received from the testator.

In gifts of future estates to persons referred to only by their kind, the actual existence of such persons at the time when the will was made is regarded as evidence that a vested estate was intended. How much more clear such intention when the remaindermen are named or described.

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In the case at bar the designation of the remaindermen was made as much by reference to their kinship to the testator as to their relation to the life tenant, They were the descendants of the life tenant, but they were equally described as the grandchildren of the testator, and the issue of his grandchildren.

There is nothing in the latter part of the paragraph under discussion by which the control of the case cited may be escaped. On the contrary, the provision that the " share " of one grandchild shall be diminished by the amount of his indebtedness to the testator at least intimates that the share so called was vested and not contingent. Had all three of the grandchildren been indebted to the testator and had the share of each been the subject of diminution accordingly, it could not be doubted that the testator meant to leave to each of them such kind of interest in the trust fund as would be against every event an adequate and responsive source for the payment of his or her debt. This would be accomplished by a vested estate but the manifest wish of the testator would be defeated if the estate to the primary remaindermen were contingent.

The will forbids the intention that if Andrew lived to take his share the debt would be paid but that his death would defeat the debt. True, these remainders could be divested, but only upon one event. If before the time of distribution a remainderman should die with issue, such issue would become the descendants contemplated in the will and as such would be entitled to the share which the parent, if living, would have taken. But the will contained no disposition in case of a death without issue. In that condition, the interest of the child of John remained vested and passed to his representatives. This appears both from the reasoning and the conclusion found in the case of *Staples* v. *Mead, supra.*

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The trust fund is payable to Arthur, Kitty and the administratrix of Charles, in proportions which remain for adjustment.

The gifts were in common and would be in equal thirds except for the burden placed upon the share of Andrew. That share must be one-third of the fund less the amount due on the loan made to him by the testator. It is uncontroverted that the loan is due and unpaid. If any sum is due, it is an amount equal to the principal of the debt and the interest thereon. The utmost interest date claimed is the date of the testator's death and this claim will be allowed.

A further question remains as to the disposition of the amount represented by the loan to Andrew. It is seldom that so few words as those now under construction have served to provoke so many problems. When the share of Andrew has been ascertained by the deduction of the amount of his obligation, the sum so retained is not to be added to the shares of the other children. Though Andrew's share was made less than one-third, their shares were not made more than one-third. The amount in question was undisposed of. The residue of the estate was devised by the 5th and 6th paragraphs, and of the one-half of the residue mentioned in the 5th paragraph there is a residue, represented by the amount due on the debt, which is no longer in the trust or subject to the devise in trust. The sums so retained must be distributed as if the testator died intestate.

Decreed accordingly.

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Matter of the Petition of ROBERT L. CHAPMAN to Prove the Last Will and Testament of MARTHA E. CHAPMAN, Deceased.

(Surrogate's Court, Kings County, February, 1917.)

Trial — before jury in contested probate proceeding — evidence — wills — when motion to set aside verdict and for new trial denied.

Where the jury in a contested probate proceeding had before them definite and substantial evidence tending to show the exercise of undue influence in the making of the will, and the absence thereof, and the only finding against proponent was that the will was produced by undue influence, a motion to set aside the verdict and for a new trial will be denied.

PROCEEDING upon the probate of a will. Motion by proponent to set aside a verdict and to grant a new trial.

Charles J. McDermott, for Robert E. Chapman and Frederick A. Chapman, in support of motion.

Fletcher, Sillcocks & Leahy (Henry Sillcocks, of counsel), for contestant, Henry Chapman, in opposition to motion.

William Murray, special guardian for Ruth M. Chapman, infant.

KETCHAM, S. This is a motion by proponent to set aside a verdict and to grant a new trial. The only finding against the proponent was that the will was produced by undue influence. Two errors of law are assigned. One, involving the application of section 829 of the Code does not present a serious aspect and is not argued. The other concerns a refusal to repeat

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an instruction which had already been expressly given.

The jury had before them definite and substantial evidence tending to show the exercise of undue influence. There was also definite and substantial evidence tending to show the absence of undue influence. If either mass of proof was disregarded the verdict which registered such disregard was not only justifiable but inevitable.

The verdict is attacked as inconsiderate and perverse. If passion, prejudice, sympathy or other form of unreason is asserted against a verdict, it is only in the evidence that search must be made for the supposed defect. Hence, however paraphrased, the only ground of relief open to one who believes that the verdict was actuated by passion, prejudice or a like impulse, is that it was against the "weight of evidence."

It may be that a court here and there has been itself betrayed into a judicial passion or prepossession, and under the spell of its own conviction as to problems which were not before it has found a jury wrong and, therefore, perverse, because its conclusions were not such as the judge himself would have reached if he had been the jury.

Despite these examples, this court will not set aside a verdict as against the evidence or against the weight of evidence when the jury have been confronted by a fair conflict of evidence. The motion is denied.

Motion denied.

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Misc.] Surrogate's Court, Lewis County, February, 1917.

Matter of the Construction of the Last Will and Testament of MARGARET LAVINA LAKE MCQUEEN, Deceased.

(Surrogate's Court, Lewis County. February, 1917.)

Wills — directions contained in — construction of — residuary estate — trusts — postponement of payment over of corpus of estate — gifts — annuities — jurisdiction — executors and administrators — accounting.

The "divide and pay over" rule, that where the only words of gift are found in a direction to divide or pay at a future time the gift is contingent and not vested, will never be applied when to do so would nullify the express intention of the testatrix, but there are many exceptions to the rule, two of which are as follows:

1. If the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest will be deemed vested at the death of the testatrix.

2. Where there are words importing a gift in addition to the direction to the executors or trustees to pay over, divide or distribute.

The residuary estate of a testatrix, who was the owner of no real estate at her death, was bequeathed to her executor in trust for certain purposes with a further direction to pay an annuity in a certain amount to a certain person until she should come into possession of other bequests under the will by which the executor, after making certain payments, was directed to take the remainder of the estate and apply the interest, dividends and proceeds thereof in equal parts to the use and support of two nieces and a nephew of testatrix and on the decease of any one of them, after necessary expenses had been taken out of his or her share, the remainder thereof should be equally divided between the survivor or survivors of them and a daughter of one of the nieces and the annuitant, and, upon the death of both nieces and the nephew, and after all expenses had been met, the principal with the interest of the trust fund was directed to be divided and paid over, one-third equally between the annuitant and the grandniece of testatrix and the remaining

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two-thirds equally among the executor and two other legatees. On application under section 2615 of the Code of Civil Procedure for a construction of the will, *held*, that it came squarely within the exceptions of the "divide and pay over" rule because,

First. It is evident that the postponement of the payment over of the corpus of the estate was for the purpose of letting in the intermediate life estates.

Second. The beneficiaries of the corpus of the estate are designated absolutely and there is no substituted gift to take effect in the event of their death.

Third. The gift of a part of the income from the property is made to the annuitant until the time comes for her to receive her share of the corpus of the estate.

Fourth. That the legatees of the one-third of the principal of the trust fund are by the terms of the will "to have and to hold the same (their share of the estate) to them and their heirs and assigns forever."

Fifth. That from the whole will it is apparent that testatrix intended a present vested gift of the corpus of the estate, enjoyment of which was to be deferred until the death of the three life beneficiaries.

That the trust attempted to be created is invalid and void because it suspends the absolute ownership of the property for more than two lives in being at the death of testatrix in violation of section 11 of the Personal Property Law.

That the gift of one-third of the principal and interest of the estate to the annuitant, and the grandniece, was valid and vested in them, as was also the gift of the two-thirds of said principal and interest of the trust fund to the executor and the two other legatees, and accelerated so they are entitled to the possession and enjoyment thereof in the same manner and to the same extent as though there had been an immediate absolute gift thereof to them.

That the gift of the annuity is void and the court has no jurisdiction in the present proceeding to determine whether the legacy to one of the legatees of the two-thirds of the principal and interest of the trust fund has been forfeited by reason of her having been a subscribing witness to the will and, as such, examined on the probate thereof, but the determination of that question will be postponed until and determined upon the judicial settlement of the accounts of the executor.

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Misc.] Surrogate's Court, Lewis County, February, 1917.

APPLICATION under section 2615 of the Code of Civil Procedure for the construction of a will.

Frank Bowman, for petitioners.

Bronner & Ward, for executor and others.

CARTER, S. This is an application under section 2615 of the Code of Civil Procedure for construction of the will of said deceased.

The said deceased died on the 7th day of November, 1915, leaving a will dated April 2, 1912, which will was duly admitted to probate in the Lewis county Surrogate's Court on the 13th day of December, 1915.

The 4th, 5th and 6th clauses or items of said will (being the only ones in dispute) are as follows:

"*4th.* All the rest, residue and remainder of my Estate — real and personal of whatever nature and kind, and wheresoever situated, I give and devise and bequeath unto my Executor hereinafter named, to have and to hold the same to him, his heirs successors and assigns in *Trust* nevertheless, and to and for the following purposes,— to enter into and take possession of the same, and receive the rents, income, dividens and profits thereof and apply the same to the purposes hereinafter mentioned.

"*5th.* I hereby direct and request my Executor to pay $60. annually, in semi-annual payments, to Isabella Jeannett Tilley named in clause 3, until such time as she shall come into the possession of the bequests as hereinafter mentioned.

"*6th.* I hereby direct and request my Executor after the payment and arrangement of and for the obligations mentioned in clauses 3 and 5 — to take the remainder of my Estate as specified in clause 4, and apply the interest, dividens and proceeds of the same

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in three equal parts for the use and support of my niece Mrs. Grace Lavinia Davidson now residing in the city of Washington D. C.— for the use and support of my niece Ella J. McQueen, and for the use and support of my nephew George McQueen both now residing in St. Louis Mo. so long as they shall live. And on the decease of any one of the three after necessary extra expenses have been taken out of that share, the remainder shall be equally divided between the survivor or survivors, and Isabella Jeannette Tilley heretofore mentioned, and Mrs. Katherine. Davidson Ahrens, daughter of Grace Lavinia Davidson, now residing in the city of New York. And after the death of the three, that is — Mrs. Grace Lavinia Davidson, Ella J. McQueen, and George McQueen, and all expenses due are met, the whole of said property, principal and interest, to be paid over and divided as follows. *One third* of whole of said property to be equally divided between Isabella Jeannette Tilley, and Katherine Davidson Ahrens, to have and to hold the same to them, and their heirs, and assigns forever. The remaining *Two thirds* of whole of said property, to be equally divided between Lyman Lyon Merriam, Helen Lyon Merriam, and Augusta Merriam Hone — all now residing in Lyons Falls, Lewis County New York."

Then followed certain provisions appointing said Lyman Lyon Merriam as executor, to serve without bonds, giving him power of sale and authorizing him as such executor and trustee to hold the securities owned by deceased at the time of her death, or dispose of same, in his discretion for the benefit of the trust. The deceased owned no real property at the time of her death.

That the said Grace L. Davidson and Ella J.

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McQueen are nieces, and the said Katherine D. Ahrens is a grandniece, and George McQueen is a nephew, of the said deceased.

That all of the beneficiaries and legatees named in the said will are living.

It is conceded by all parties that the trust attempted to be created by said will is void, because it suspends the absolute ownership of the personal property for more than two lives in being at the death of the testatrix, and is in violation of section 11 of the Personal Property Law; except that the executor contends that the gift over of the corpus of the estate, one-third to Isabella Jeannette Tilley and Katherine Davidson Ahrens, and two-thirds to Lyman Lyon Merriam, Helen Lyon Merriam and Augusta Merriam Hone, and the gift of sixty dollars per year to said Tilley, are valid; while on the other hand, the petitioners claim that the entire trust is void and the said gift over of the corpus of the estate falls with the trust and is also void. As to whether this gift over of the corpus of the estate is valid or void is practically the only question to be determined.

The first question to be investigated is whether the interests of the legatees in the corpus of the estate is vested or contingent. This brings us to a consideration of the so-called "divide and pay over rule," which rule has been stated as follows: "Where the only words of gift are found in the direction to divide or pay at a future time the gift is future, not immediate; contingent and not vested." *Matter of Crane,* 164 N. Y. 71. This rule, notwithstanding the criticism to which it has recently been subjected (*Dickerson* v. *Sheehy,* 209 N. Y. 592), is still recognized. *Fulton Trust Company* v. *Phillips,* 218 N. Y. 573, 584. In discussing this rule in *Fulton Trust Company* v. *Phillips,*

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supra, the court said: " Where a contrary intention is not manifested in the will it is a settled rule of construction that if futurity is annexed to the substance of the gift, the vesting of title is suspended, but if the gift is absolute and the time for payment only is postponed the gift is not suspended, but the title vests at once;" and the court, in the same case at page 583, said: " It is a rule which courts will never apply, where to do so would nullify the express intention of the testator."

It is said there are many exceptions to the rule under consideration. *Matter of Tienken,* 131 N. Y. 391, 409. Two of these exceptions are stated in *Matter of Crane,* 164 N. Y. 71, in substance, as follows: (1) " If the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at the death of the testator." (2) " Where there are words importing a gift in addition to the direction to the executors or trustees to pay over, divide or distribute."

And it seems that the rule under consideration does not apply where there is a gift to a legatee of the income on a fund until the fund is directed to be paid over to such legatee. *Vanderpoel* v. *Loew,* 112 N. Y. 167, 181, and cases cited.

It was recently said by very eminent authority (see dissenting opinion by Chief Judge Cullen, with whom Judges Gray and Willard Bartlett concur, in 209 N. Y. 592) " that a gift by means of a direction to divide or pay over at a future time will not be deemed contingent so as to fail on death before that time, unless provision is made for a substituted gift in favor of the issue of the first devisee or legatee."

Now that we have this " divide and pay over rule " before us, with some of its exceptions and limitations,

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it is evident that it does not apply to the will before us, or at least that the said will is squarely within the exceptions of the rule for the following reasons:

First. It is evident that the postponement of the payment over of the corpus of the estate was for the purpose of letting in the intermediate life estates.

Second. The beneficiaries of the corpus of the estate are designated absolutely, and there is no substituted gift to take effect in the event of the death of said beneficiaries.

Third. The gift of a part of the income from the property is made to Isabella Jeannette Tilley until the time comes for her to receive her share of the corpus of the estate.

Fourth. The said legatees, Tilley and Ahrens, are, by the terms of the will, "to have and to hold the same (their share of the estate) to them and their heirs and assigns forever."

Fifth. From a view of the whole will it is apparent that the testatrix intended a present vested gift of the corpus of the estate, enjoyment of same to be deferred until the death of the three life beneficiaries.

"A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." Real Property Law, § 37. "A future estate * * * is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates." Real Property Law, § 40. "A remainder valid in its creation shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect." Real Property Law, § 58.

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The above quotations from the Real Property Law are made applicable to personal property by section 11 of the Personal Property Law.

In *Whitwell* v. *Whitwell,* 146 App. Div. 270, 272, it was held that the words " shall pass to " are words of direct gift. In the case of *Matter of Van Kleeck,* 95 Misc. Rep. 40, the clause of the will under consideration read as follows: " *Second.* I give and bequeath unto my executors and their survivors in trust five thousand ($5,000) dollars, to be by them safely invested, and the income of the same to be handed to Mrs. Daniel W. Leeds, wife of Daniel W. Leeds, and at her decease the principal to go to her daughter." It was held the words " to go to " implied a present and direct gift. In *Matter of United States Trust Company,* 78 Misc. Rep. 227, the 5th clause of the will in question, in substance, gave all of testator's property in trust, the income to be paid to his wife until her death or remarriage, and then " To pay to my brother, David S. Egleston, $25,000.00." David S. Egleston died before the testator's widow. The court, after careful and exhaustive consideration of the subject, held that the gift of $25,000 vested in said David S. Egleston on the death of the testator. In *Matter of Peters,* 96 Misc. Rep. 535, the testatrix gave her executor one-third of her estate in trust for the benefit of her daughter, Anna Maria Taggart, " to pay the net income therefrom as often as half yearly to her during her life, and in trust upon and after her death *to pay over and divide* the principal or capital thereof to and among the children of my said daughter, in equal shares, upon their severally becoming twenty-one years of age, and during their minority to apply the income of each child's share to his or her use toward their support and maintenance." The

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testatrix died on the 4th of January, 1897, and her daughter, Anna Maria Taggart, died on the 5th of September, 1915. At the date of the death of the testatrix Anna Maria Taggart had four children living, and three of them survived the life tenant. The other, Josephine Wilde, predeceased her mother, but was survived by three infant children. Held, on authority of *Fulton Trust Company* v. *Phillips, supra,* that the remainders were vested, and the share of the said Josephine Wilde goes to her legatees if she made a will, or to her next of kin if she died intestate.

It seems to me that the words " to be paid over and divided," as used in the will before us for construction, mean the same and would be generally understood to mean the same as though the testatrix had used the words " shall pass to," " to go to," " to pay to," used in the cases above mentioned, or the words " I give."

The will in question was drawn by the testatrix, and I think she used the words which would usually have been employed by a layman, and perhaps those learned in the law, in expressing a present gift, the enjoyment of which was postponed to let in life estates. A will drawn by a layman should receive much the same construction as a layman would give it. *Overheiser* v. *Lackey,* 207 N. Y. 229, 233, 234; *Mee* v. *Gordon,* 187 id. 400, 408.

It is said the interposition of a trust estate never prevents the vesting of a remainder interest. *Matter of Van Kleeck,* 95 Misc. Rep. 40.

"A remainder is not to be considered as contingent in any case where it may fairly be construed to be vested, since the law favors the vesting of estates. The adverbs of time, therefore, such as when, then, after, from and after, etc., in a devise of a remainder

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limited upon a life estate, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest." *Connelly* v. *O'Brien*, 166 N. Y. 406, 408.

The rule that in a doubtful case the construction of the will should be more favorable to the next of kin should not apply here as to the said Lyman L. Merriam, Helen L. Merriam and Augusta M. Hone, in view of the evidence which shows testatrix's long, friendly and intimate relation with them and their ancestors, she having lived as one of the family with them or their ancestors for about seventy-six years, in close friendly relation, until her death at ninety-nine years of age; and all of the property owned by her having been received by her for services in their families and in the families of their ancestors.

When we take into consideration that the law favors the vesting of estates (*Cammann* v. *Bailey*, 210 N. Y. 19, 30); that where the will is silent as to the period of vesting the gift is vested immediately on the will coming into operation, whenever it appears that the enjoyment of the legatee is postponed merely for the convenience of the estate or to let in an intervening interest (*Matter of United States Trust Company*, 78 Misc. Rep. 230, 236); that the interpretation is to be preferred which will prevent either a total or partial intestacy (Jessup-Redf. Surr. 544, and cases cited); and that in every case the intention of the testator controls (*Cammann* v. *Bailey*, 210 N. Y. 19, 30); we are forced to the conclusion that the gift over of the corpus of the estate to Tilley, Ahrens, Lyman L. Merriam, Helen L. Merriam and Augusta M. Hone became vested in said legatees at the time of the death of the testatrix and that the time of the enjoyment only of the gift was postponed until the death of the three life beneficiaries.

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In *Kalish* v. *Kalish,* 166 N. Y. 368, 374, 375, the court said: "It is axiomatic that courts cannot make new wills for testators who have failed to make valid wills for themselves. While recognizing the force of this truth courts have from the earliest times been compelled to choose between the alternatives of setting aside certain wills altogether, or of cutting out simply their void provisions. This necessity has led to the rule which is now firmly established in this state, that when the several parts of a will are so intermingled or interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be."

The trust being for more than two lives and therefore void, and the gift over of the corpus of the estate being vested and valid, as we have seen, and it appearing that the main object of the testatrix was to give the corpus of her estate to the legatees named, no good reason appears why we cannot hold the trust void and the gift over valid and accelerated so as to take effect in enjoyment as of the date of the death of the testatrix. We are not without authority in doing this. *Kalish* v. *Kalish, supra,* and cases therein cited, and *Matter of Berry,* 154 App. Div. 509, unanimously affd. 209 N. Y. 540, no opinion.

In the *Berry* case the testator, by the 10th clause of his will, in substance, gave all of the remainder of his property to his executor in trust, to invest and pay the income therefrom for a period of five years from the date of the death of the testator, one-half thereof to a corporation (named) and the other half to another

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corporation (named), and after the expiration of said five years "to pay over the principal of my said residuary estate to the Lutheran Hospital." It was held that the gift of the income to the two corporations was invalid, because the trust was measured not by two lives in being but by the definite period of five years; that the gift to the Lutheran Hospital was a vested remainder and valid; and "that a vested gift, otherwise valid, will not fail merely because it is limited to take effect at the expiration of a trust which is void under the Statute of Perpetuities."

The last mentioned authority is directly in point and controlling in the case at bar. The only possible distinction that has been suggested between the said *Berry* case and the case at bar is that the trust in the *Berry* case is for a definite period of five years, while in the case at bar the trust is for three lives; that the time of vesting of the estate in the *Berry* case was fixed and certain while the exact time of vesting in the case at bar is uncertain. I fail to see any force to this argument. A trust (like the one in question) measured by a fixed time, however short or long, is equally void with a trust measured by more than two lives. It is not the certainty of the time of the happening of the contingency, but the certainty that the contingency will occur that determines whether the estate is vested. *Williamson* v. *Field,* 2 Sandf. Ch. 533, 4 Kent, 203. In both the *Berry* case and the case at bar the trusts are void but the gifts over of the remainder are vested and valid.

The case of *Hitchcock's Will,* 176 App. Div. 326, is also directly in joint and is to the same effect as *Matter of Berry, supra.*

The cases relied upon by the petitioners to show that the gift over of the remainder was void, namely, *Fow-*

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ler v. *Ingersoll,* 127 N. Y. 472; *Hooker* v. *Hooker,* 166 id 156; *Schettler* v. *Smith,* 41 id. 328; *Knox* v. *Jones,* 47 id. 389; *Hawley* v. *James,* 16 Wend. 62; *Colton* v. *Fox,* 67 N. Y. 348, and other cases cited, are all distinguishable from the case at bar for the reason that in each of said cases the gift over was contingent and not vested, the identity of the parties to whom gifts were made being uncertain at the death of the testator. The case of *Hawley* v. *James, supra,* seems to support the contention of the executor; and see discussion of same in *Everitt* v. *Everitt,* 29 N. Y. 39, 81.

The case of *Simpson* v. *Trust Company of America,* 59 Misc. Rep. 96; affd., 129 App. Div. 200; affd., 197 N. Y. 586, no opinion, is also distinguishable from the case at bar, because after the void trust in the will then under consideration, the gift over to the nephew, Joseph S. Lichtenberg, and the niece, Allie Lichtenberg, was followed by these words: " so that the lawful issue of either of them who shall have deceased will take the parent's share," and therefore the gift over was contingent and not vested, for it could not be ascertained until the end of the trust period whether the nephew and niece or their issue would take the gift over.

It is also contended by the executor that the gift of sixty dollars a year to the said Isabella Jeannette Tilley is payable out of the principal and not out of the income and therefore that it is valid; but in my opinion, from the reading of clauses 4 and 6 of said will this gift of sixty dollars per year is to be paid out of income of the trust fund, and since the trust is void this gift is also void.

I am asked to determine in this proceeding whether Augusta M. Hone has forfeited her right to the legacy given to her by said will by reason of her having been one of the two subscribing witnesses to said will and one of the witnesses examined on the probate thereof.

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It is contended by the executor that this court has no jurisdiction to determine this question at this time and that a determination should not be made until the time of the final accounting and distribution herein, but no objection is made as to the jurisdiction of this court to determine any other question arising in this proceeding.

Section 2615 and subdivision 8 of section 2510 of the Code of Civil Procedure confer jurisdiction on this court, in a special proceeding brought for that purpose, "To determine the validity, construction or effect of any disposition of property contained in any will proved in his court."

Prior to the enactment in 1914 of the statute above quoted, Surrogates' Courts did not have jurisdiction to pass on the question here presented in an independent proceeding, and such question could only be determined in an action brought for that purpose, or on the accounting of the executor. *Matter of Beck,* 6 App. Div. 211, 214; affd., 154 N. Y. 750.

Does the language of the statute above quoted authorize this court in such independent proceeding to determine whether the valid gift by said will to said August M. Hone has been forfeited because of her having signed the will as a witness and been examined on the probate thereof?

After careful consideration I have reached the conclusion that the language above quoted does not confer such jurisdiction on this court; that to determine such question is not a construction of the will but is the determination of a question independent of the will, outside thereof and subsequent thereto; and that this question should not be determined in this proceeding but should be postponed until and determined upon the accounting of the executor herein.

I, therefore, decide that the trust attempted to be

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created by said will is invalid and void; that the gift in the 6th clause or item of said will of the principal and interest of the estate to Isabella Jeannette Tilley, Katherine D. Ahrens, Lyman Lyon Merriam, Helen Lyon Merriam and Augusta Merriam Hone is valid and vested in them, and accelerated so they are entitled to the possession and enjoyment thereof in the same manner and to the same extent as though there had been an immediate and absolute gift thereof to them by said will; that the gift of sixty dollars per year to said Isabella Jeannette Tilley is void; that this court has no jurisdiction, in the proceeding, to determine whether the legacy of said Augusta M. Hone has been forfeited, and that the determination of that question be postponed until and determined upon the accounting of the executor of said will.

Decreed accordingly.

Matter of the Estate of SUSAN CROSS, Deceased.

(Surrogate's Court, Madison County, February, 1917.)

Lunatics — commitment of lunatic to state hospital as poor person — when claim against estate of decedent rejected — waiver — Insanity Law, § 85.

Where at the time of the commitment of decedent's husband to a state hospital, as a poor person, neither he nor she had any means except her ability to work, and during her lifetime no proceedings were taken to charge her for his care as an insane patient, a claim therefor against her estate, which had accumulated from her earnings as a domestic, after his commitment, will be rejected on the ground that even if it could have been enforced it had been waived by the state commission in lunacy in the exercise of the discretion conferred by section 85 of the Insanity Law and such waiver could not be recalled after the death of the wife.

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CLAIM against an estate for care of decedent's husband as an insane patient in a state hospital.

Egburt E. Woodbury, Attorney-General, by Alex. T. Selkirk, Deputy Attorney-General, for claimant.

Joseph Beal, for executor.

SENN, S. The Binghamton State Hospital has presented a claim of $1,358.71 against the above named estate for the care of Edwin Cross, husband of testatrix, or an insane patient.

Susan Cross, testatrix, died February 10, 1915, leaving an estate of about $514.21, being a deposit in the Oneida Savings Bank. This has increased by interest accumulated and probably amounts to about $550 at this time. The funeral expenses and expenses of administration amount to $269; admitted claims $119.50. The only disputed claim is that of Binghamton State Hospital. The attorney-general offers to concede priorty to any bill for physician's or nurse's services rendered during testatrix's last illness, in addition to the $269 which would at any rate be preferred; but otherwise claims for the state the preference conferred by section 86 of the Insanity Law.

It is conceded that testator's husband was committed to Binghamton State Hospital as a poor person. It was probably certified by the judge who granted this commitment under section 82 of the Insanity Law that said Edwin Cross and those liable for his maintenance had no property or means to pay for the same. At any rate it is conceded that at the time of commitment neither said Edwin Cross nor his wife had any property or means except the wife's ability to work and that during the lifetime of testatrix no proceedings were taken to charge her with any part of claimant's

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bill; also that the sum of $514.20 left by her was the accumulation from her earnings as a domestic earned by her after her husband's commitment to the state hospital. If, after her husband was committed and during her lifetime, the state had sought to compel contribution on the part of the wife from her earnings, I do not think it will be seriously contended that any court would have held that she must contribute. Had any such action or proceeding been taken at any reasonable time after her husband was received at the state hospital she would probably not have felt it her duty to qualify herself as a person of "sufficient ability" to pay for his care and maintenance by hiring out as a domestic. I think she had a right to believe that there was no intention to look to her for contribution and that she worked to save money as she did in the belief that her earnings would be hers to enjoy or use in sickness or old age. It is true that this money is of no present benefit to her, but if the Binghamton State Hospital could not have been allowed to sit passive while she was saving this money and then when she had an accumulation, perhaps in her old age or illness, suddenly confront her with a large bill for services, care and maintenance, neither can they do so after her decease. I think the failure to make any claim upon her or to give her any notice of a possible intention to make such claim, precludes the claimant from enforcing its claim at this time.

I think the claim for support, care and maintenance of Edwin Cross was waived, if indeed it could ever have been enforced. I think that it can be waived by the commission. Section 85 of the Insanity Law is pretty broad in its terms. Among other things, it provides that: "The commission may, in its discretion, waive the whole or a portion of the claim of the state

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for the cost of the support of a patient against the estate of such patient, whenever the court by which a committee was appointed shall have directed such committee to apply any part of the patient's estate for the maintenance of his family." That does not in terms cover the present case but I think the omission to do so is supplied by the following language appearing toward the end of the same section, viz.:

"The commission may appoint agents * * * to secure from relatives and friends who are liable therefor * * * reimbursement, in whole or in part, * * * The commission may fix the rate to be paid for the support of an inmate of a state hospital * * * by relatives liable for such support * * *."

I believe that the intent of the section, taken as a whole, was to give the commission a discretion to waive in whole or in part the claim for support as against relatives who could possibly contribute but to whom such enforced contribution would be a great hardship and injustice.

No decision of any appellate court of this state covering the precise question raised by the facts of this case, under the present provisions of the Insanity Law, or under any precisely similar provisions of previous statutes, has been brought to my attention.

Matter of Wesley, 156 App. Div. 403, was a claim against the estate of an incompetent who had no means when committed but afterwards some funds were realized from the sale of some household effects. The case at bar would be somewhat similar if after Edwin Cross was committed as a poor person property had come to him, or if his wife by some means other than by manual labor had come into possession of property. In that case she would at least have been liable for her husband's care rendered after she became

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possessed of the property, if not for that rendered before.

I base my decision on the ground that the commission could and did waive its claim, if any it had, against testatrix, for the maintenance of her husband at the hospital, and that encouraged by such waiver the testatrix, deprived of her husband's support, worked out as a domestic and saved the money now constituting her estate. In my opinion this waiver could not be recalled after her decease.

The claim in dispute is, therefore, rejected.

Claim rejected.

Matter of the Estate of AUGUSTIN DALY, Deceased.

(Surrogates' Court, New York County, February, 1917.)

Executors and administrators — commissions of — accounting — attorneys — when compensation for legal services denied — Code Civ. Pro. § 2753.

Section 2753 of the Code of Civil Procedure, as amended in 1914, is retroactive in its operation and thereunder an executor-attorney may be awarded compensation for legal services performed for the estate prior to September 1, 1914, when said section went into effect.

The estate of a deceased executor-attorney is entitled to receive a reasonable sum in compensation for legal services, severable and apart from executorial functions, rendered to the estate of his decedent prior to September 1, 1914, in so far as a claim therefor is not barred by decrees entered either on intermediate or private accountings.

The decree entered on the last intermediate accounting August 30, 1909, *inter alia*, fixed the basis of apportionment of commissions of the two executors and provided for the distribution, in stated proportions, to the different beneficaries, of the balance of the funds in their hands down to April 19, 1909, and that any moneys coming into the hands of the executors

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from and after said date from the profits of continuing the decedent's business as well as any moneys derived from other sources coming to the executors should be paid and distributed by them, after deducting expenses of administration and executors' commissions to be computed and apportioned on the same basis as the commissions allowed by the decree, to the same persons and institutions and in the same proportions as set forth by said decree. The executors accounted to the beneficiaries, distributed the additional assets, paid the administration expenses, deducted commissions as directed by said decree, and took from the beneficiaries general releases, under seal, from all claims and demands by reason of every matter embraced in said accounts. *Held*, that the executors and their representatives were bound to abide by the consequences of their own acts acquiesced in by every one interested in the estate and evidenced by over eight complete settlements between the executors and all other parties.

That the executor-attorney was foreclosed from receiving additional compensation for legal services in connection with the acts embraced in the accounts and transactions between the parties from April 19, 1909, to December 31, 1913, and that an application by his legal representatives under section 2753 of the Code of Civil Procedure, for compensation for legal services rendered by him to the estate prior to the date when said section went into effect, will be denied but an allowance for legal services rendered after December 31, 1913, will be approved.

MOTION to confirm report of Sidney Harris, referee.

Edward H. Daly, for executors.

Wetmore & Jenner, for certain objectors.

Washburn, Ruston & Koehler, for James C. Duff, as executor under the will of Mary D. Daly.

Francis J. Hogan, for St. Zita's Home for Friendless Children.

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John Whalen, for The Roman Catholic Orphan Asylum.

Oscar C. Kunze, for Guy Van Amringe, executor of Mrs. G. H. Gilbert.

COHALAN, S. Upon the exceptions filed to the referee's report arise questions of the construction and operation of section 2753 of the Code of Civil Procedure in regard to an allowance of compensation to an executor for legal services rendered by him to the estate, prior to the date when section 2753 of the Code of Civil Procedure, as amended in 1914, became effective.

The late Judge Joseph F. Daly acted as executor of this estate from 1899 until his death in 1916, subsequent to the hearings herein before the referee. It is claimed that as " an attorney and counselor-at-law of this state " he rendered valuable legal services to the estate during the entire period of his executorship down to the filing of this account on August 24, 1915, for which services compensation is sought under existing section 2753 of the Code of Civil Procedure, enacted in 1914.

It is conceded that Judge Daly exercised unusual ability in his management of the estate. Although it was practically insolvent in the beginning, it was made to produce, through his efforts, large sums of money for the benefit of the legatees. There seems to be no doubt that from the business standpoint of valuation the amount of ordinary executor's commissions which he received, or to which his estate may be entitled, cannot be said to be adequate remuneration for the very valuable and successful services he rendered to the estate. But such a consideration cannot be given any

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weight where the compensation is fixed by statute. Whether Judge Daly's legal representatives should be paid the sums claimed for legal services must, of course, be determined by the principles of law that are applicable to the situation presented.

In view of the determination of this matter at which I have arrived, it will be unnecessary to examine the alleged legal services in detail for the purpose of considering and deciding whether *all* of the acts claimed as legal services were actually such within the purview of the statute, or were (as contended) so interwoven with purely executorial duties as to make it impossible to separate the work done by the executor in his executorial capacity from that performed by him in the capacity of attorney. There was shown sufficient work of a purely legal nature, severable and apart from executorial functions, to warrant consideration of his claim upon the following grounds, which, as will more fully appear, are the only ones I deem necessary to discuss:

First. Does section 2753 of the Code of Civil Procedure authorize the surrogate to award to an executor-attorney compensation for legal services performed prior to September 1, 1914, the date upon which said section, as amended, became effective?

Second. Do the accounting decrees of July 2, 1907, and August 30, 1909, bar the claim of Judge Daly for legal services performed in connection with acts set forth in the accounts judicially settled by those decrees?

Third. Do the private accountings of the executors to the beneficiaries from April 19, 1909, to December 31, 1913, and the payment of distributive shares and of executors' commissions and administrative expenses as set forth in said private accountings pursuant to the decree of August 30, 1909, which directed such

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payments, conclude the executor-attorney from receiving in this judicial accounting additional compensation for legal services rendered to the estate during the periods embraced in said private accountings?

As to the first proposition regarding the general scope and effect of section 2753 of the Code of Civil Procedure, as amended:

By chapter 443, Laws of 1914, former section 2730 of the Code of Civil Procedure was amended and changed to existing section 2753 of the Code of Civil Procedure. By said amendment the surrogate was authorized to allow to an executor such compensation for legal services " as shall appear to the surrogate to be just and reasonable," if the executor be " an attorney and counselor-at-law of this state," where said executor " shall have rendered legal services in connection with his official duties." Prior to this amendment it was well settled that an executor or administrator could not receive extra compensation for legal services rendered by him to the estate. *Collier* v. *Munn,* 41 N. Y. 143; *Matter of Wallach,* 164 App. Div. 600; affd., 215 N. Y. 622.

It is contended that said section 2753 of the Code of Civil Procedure, as amended in 1914 to permit an allowance for legal services to an executor-attorney, is retroactive in its operation and authorizes and empowers the surrogate to award compensation for such legal services, though they were performed prior to the time when the act took effect. This construction of the statute is opposed by the contesting legatees. The referee held that the amended Code section should be given a retroactive effect and operation.

While it is well settled that a law is generally presumed to apply only to cases arising subsequently to its enactment and that a law should never be given a

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retroactive effect except where its express language so indicates, but should whenever reasonably possible be given a prospective operation (*New York & Oswego M. R. R. Co.* v. *Van Horn,* 57 N. Y. 473; *Jarvis* v. *Jarvis,* 3 Edw. Ch. 462, 487), and while the legislature is forbidden by the Federal Constitution from enacting any law that disturbs vested or property rights, yet it appears that the first statute of this state that awarded commissions to an executor was held to authorize an award of commissions for executorial services rendered prior to the enactment. *McWhorter* v. *Benson,* Hopk. Ch. 28; *Dakin* v. *Demming,* 6 Paige, 95, 101. The statute of 1892 increasing commissions was held to apply to trustees who had been in office administering the duties of their trust long before the enactment. *Naylor* v. *Gale,* 73 Hun, 53. These cases are the authorities cited in support of the referee's finding upon the theory that the principle that governs the application of a statute awarding compensation for usual executorial services should likewise control in applying a statute that authorizes an award of compensation for "extra services" of an executor. The attorney's services rendered by Judge Daly are classified "as extra services." *Collier* v. *Munn,* 41 N. Y. 145.

It is urged, however, that there is a difference between a statute either authorizing or increasing an allowance of commissions to an executor and the amendment under consideration, because, it is said, those statutes recognized a relationship that had theretofore existed between representatives and estates and merely permitted an award of compensation for the usual services performed during such continuing relationship, while the 1914 amendment in section 2753 of the Code of Civil Procedure is said to contemplate or intend the creation of an entirely new relationship of attorney and client between an executor in his two

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capacities, that is, in his capacity as executor and in his capacity as attorney and counsel. But this contention seems to overlook the fact that prior to 1914 there was nothing in the law that prevented an executor who happened to be an attorney from acting as attorney for himself in the administration of an estate, though, of course, under the law, as it then existed, the executor was not entitled to compensation for such legal services. But the relationship, though without pecuniary reward therefor, *could* exist. The executor of this estate did, in fact, act as attorney and counselor for himself in his executorial capacity. There seems to be scarcely any essential difference in principle between this situation and one prior to the enactment of the statute of 1817, where an executor performed, personally, executorial functions, which were customarily attended to by agents employed by executors (*Collier* v. *Munn,* 41 N. Y. 146), because an executor could receive no compensation for such services when performed personally (*Manning* v. *Manning,* 1 Johns. Ch. 527), while he could receive reimbursement for payments to an agent employed to perform the same services. It seems, therefore, that the cases of *Dakin* v. *Demming* and *Naylor* v. *Gale, supra,* are authoritative upon the precise question under consideration.

The well settled rule, that the statute existing at the time of the passage of the accounts is the one which governs the allowance of compensation to an executor, is based upon the ground that an executor is not entitled to any compensation until the final execution of the duties imposed upon him. *Naylor* v. *Gale,* 73 Hun, 55. The executor acquires no accrued right to compensation until his accounts are being settled and his acts and conduct passed upon by the court, as it is only at that time that his services can be examined and his

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compensation fixed. It would seem, therefore, that in applying the law in force at the time the right to compensation accrues, whether the compensation be for services purely executorial or of the nature of extra services, such as legal services, or, in other words, whether the compensation sought be for services that either may or may not be remunerated under the law in force when the services were performed, the rule of applying the statute in force at the time of the judicial accounting does not give said statute so much a retroactive effect, as it applies a new statute to an existing condition of things. In such a case the statute applied is the statute in force when the right to compensation has accrued. *Laird* v. *Carton,* 196 N. Y. 169.

On the first ground, therefore, I am of the opinion that the referee was right in holding that the estate of Judge Daly is entitled to receive a reasonable sum in compensation for legal services rendered prior to September 1, 1914, in so far as such claim is not barred by the accounting decrees of July 2, 1907, and August 30, 1909, and by the private accountings covering the period from April 19, 1909, to December 31, 1913.

The second question involves the effect of the judicial decrees of 1907 and 1909. The referee held that the decrees of 1907 and 1909, judicially settling the accounts of the executors, were a bar to any claim for compensation for legal services in connection with any of the acts of the executors included in the accounts settled by these decrees. The cases cited by the referee show that he is correct in this decision. *Matter of Tilden,* 44 Hun, 441, 445; *Matter of Prentice,* 25 App. Div. 210.

The third question goes to the effect upon the executors' claim of the transactions between all the parties in connection with the private accountings, rendered subsequently to the accounting decree of 1909.

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The decree of August 30, 1909, among other things, contained a provision in paragraph 3 thereof, fixing the basis of apportionment of commissions between the two executors. The 6th paragraph of the decree provided for the distribution of the balance of funds in the hands of the executors down to April 19, 1909, to the different beneficiaries, in stated proportions. Because further assets were expected to come into the hands of the executors, the decree provided as follows:

"*Seventh.* Any moneys coming to the hands of the executors from and after the date of the supplemental account, April 19, 1909, from the profits of continuing the business of Daly's Theatre, London, and the licensing of plays or from the proceeds of sales of any of said property, as well as any moneys derived from other sources, coming to them as such executors, shall be paid and distributed by them (after deducting expenses of administration and their commissions as executors to be computed and apportioned on the same basis as the commissions allowed by this decree), to the same persons and institutions and in the same proportions as set forth in the Sixth paragraph of this decree."

Thereafter, and in compliance with the terms of said paragraph 7 of the decree, the executors distributed to the beneficiaries the money coming into their hands, rendered to them accounts therefor, showing payment of administration expenses and reservation of executors' commissions and took from the beneficiaries general releases under seal in the following form:

"Received from Joseph F. Daly and Richard Dorney, surviving executors of the last will and testament of Augustin Daly, deceased, the sum of

dollars, in full of the share of the under-

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signed in the distribution of the balance shown on within account under the final decree of August 30, 1909, and the said executors, and each of them, are hereby released from all claims and demands by reason of every matter embraced in said account.

Signed and sealed this day of 19 ."

Such accountings, including the taking of releases, payment of expenses and deduction of commissions, covered a period extending from April 19, 1909, to December 31, 1913. At the time of the payment of expenses of administration and deduction of commissions upon the payments stated in the private accountings, no claim was made by Judge Daly for legal services performed by him for the estate. Under the law as it existed then, Judge Daly was not entitled to any compensation for extra services as attorney. It is contended on behalf of his estate that the semi-annual payments of expenses and distributive shares and deductions of commissions thereon are not a bar to an award in this accounting of extra compensation for legal services performed by the executor-attorney during the period embraced in the private accountings, of which the semi-annual payments were part. The referee held that said semi-annual statements and accountings were not a bar to such an allowance in this proceeding, and awarded the executor-attorney the sum of $4,350 for legal services performed during the period extending from April 19, 1909, to December 31, 1913.

The referee held that the rendering of the semi-annual accounts, accompanied by the deduction of commissions and administration expenses, as directed by the decree of August 30, 1909, and the taking of releases from the beneficiaries, were not a bar to an allowance, in this proceeding, to the executors for legal

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services performed during the periods embraced in said private accountings. The referee so held upon the authority of *Naylor* v. *Gale,* 73 Hun 53, upon the theory, that the executor, so far as the semi-annual accounts are concerned, is in the same position as a trustee, who pays income and deducts commissions thereon, on a system of annual rests. The referee stated in his opinion that reservations of commissions "by executors as well as trustees are not conclusive on the parties thereto until the decree of the surrogate's court is made passing and approving them."

If there is an analogy between the acts of these executors, reserving commissions on income paid to the beneficiaries, and that of a trustee, paying income and reserving to himself commissions thereon, it would seem to follow (were such a question to arise) that the executors would be deemed to have waived any right to further commissions upon the income already disbursed and accounted for. *Cook* v. *Stockwell,* 206 N. Y. 481; *Spencer* v. *Spencer,* 38 App. Div. 403. If the executors would be deemed to have waived the right to further commissions, they must be deemed to have also forfeited any right to demand or receive any extra compensation for legal services, for the only authority for allowing herein compensation for legal services rendered in connection with past transactions, in which the money has been disbursed and accounts rendered to the parties, is the analogy such an allowance bears to the award of commissions, and because the cases hold that a new law may be applied to past services so as to allow, by commissions, compensation or increased compensation for such past services.

The cases cited by the referee are, in my opinion, inapplicable to the facts of this case. I think there is a decided difference between the case of *Naylor* v. *Gale,*

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supra, and the facts herein as regards this question. In *Naylor* v. *Gale,* the trustees, upon their own responsibility, had deducted their commissions upon income disbursed. This, trustees may legally do. *Matter of Mason,* 98 N. Y. 527. Executors, however, have no power or right to deduct their commissions in advance of their allowance by the court (*Wheelwright* v. *Rhoades,* 28 Hun, 57), and if an executor does so it may be good ground for his removal. *Matter of Havemeyer,* 3 App. Div. 524. The deductions of commissions by the executors as set forth in the private accountings and shown by the executors' receipts were lawful, because such reservations of commissions were sanctioned and allowed by decree of the court. The decree of August 30, 1909, expressly provided that moneys coming into the hands of the executors subsequently to April 19, 1909, were to be "paid and distributed by them (after deducting expenses of administration and their commissions as executors to be computed and apportioned on the same basis as the commissions allowed by this decree) to the same persons and institutions and in the same proportions as set forth in the Sixth paragraph of this decree."

This provision of the decree was a judicial allowance of commissions to the executors with an express instruction as to their manner of computation and apportionment. The computation, apportionment and deduction of the commissions were in compliance with the terms of the said decree. Upon the doing of the acts directed by the decree, the executors were discharged as to said acts. The directions in the decree regarding the computation and deduction of commissions could not be changed or varied except by opening the decree, which could be done only on the statutory grounds. As already shown, the subsequent

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change in the law regarding compensation for legal services is not sufficient to warrant the opening of a decree.

The case of *Naylor* v. *Gale, supra,* is not authoritative herein for the further reason that no question arose in that case as to the effect of general releases. In the matter now before the court, the executors accounted to the beneficiaries, distributed the additional assets, paid the administration expenses, deducted commissions, as directed by the decree of August 30, 1909, and took from the beneficiaries general releases, under seal, releasing the executors from all claims and demands by reason of every matter embraced in said accounts. Apart from the fact that compliance with the decree discharged the executors from any liability as to all matters embraced therein, the effect of a private accounting and releases, as between executors and the persons interested in the estate, is to make said accounting conclusive as between the executors and the parties who have duly released them in such private settlement. An executor cannot be required to account to the court as a matter of right at the instance of a person who has duly released the executor in a settlement made out of court. Such person has not the right to set the machinery of the Surrogate's Court in motion, in the face of a duly executed release and evidence of a complete settlement between the executor and all persons interested, where the release and the settlement are not attacked for fraud or the like. *Matter of Wagner,* 119, N. Y. 28. If the beneficiaries are prevented from questioning the transactions involved in a settlement, an executor should likewise be bound by it. In the absence of fraud, clerical error or like cause, I believe these executors and their representatives are bound to abide

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by the consequences of their own acts, acquiesced in by every one interested in the estate and evidenced by over eight complete settlements between the executors and all other parties. A statute subsequently enacted authorizing an award to an executor for "extra services" does not constitute sufficient cause to open such accounts.

It is true that the present judicial accounting includes acts already embraced in the private settlements between the representatives and the parties subsequent to April, 1909, and there is no objection to that form of the account. But it is also true that none of the beneficiaries would have any standing to object to any of those transactions in the face of their releases apparently duly executed and not questioned or assailed. The court can only approve, *pro forma*, what has already been completely settled out of court. The acts included in the private settlement may have the sanction and confirmation of a judicial decree in this proceeding, but such acts were already passed and approved in advance by the decree which directed their performance. Such judicial approval included the reservation of future commissions and payment of future administration expenses, which acts were expressly directed by the decree of August 30, 1909. This decree merely went further than the usual decree that directs payments to be made. In such a case the accounting representative does the acts directed, takes vouchers for the payments made, and is thereby discharged. It would not be seriously contended that payments so made were distinct from the judicial accounting and decree in which they were actually directed. So, here, there seems to be no escape from the conclusion that when the right of the executors to commissions or compensation accrued between April

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19, 1909, and December 31, 1913, there was in force a judicial decree allowing such payments when made, and that the payments to the executors for services, like the payments to the beneficiaries on account of additional assets received, all related back to the decree of August 30, 1909, pursuant to which said acts were performed. The doing of these acts directed by the decree have the same effect, so far as barring the claim is concerned, as the acts specifically stated in the accounts filed in the proceeding, in which the decree was signed. The private accountings and releases are an additional bar.

I am of the opinion, therefore, that the executor-attorney is foreclosed from receiving any additional compensation for legal services in connection with the acts embraced in the accounts and transactions between the parties from April 19, 1909, to December 31, 1913.

These conclusions leave open for allowance the legal services rendered during the period from December 31, 1913, to the present accounting only. The finding of the referee that the reasonable value of such services is $175 is approved. This disposition renders unnecessary the finding of fact of the referee's report numbered XIV (1), and requires a modification of finding of law No. 6 to accord with this opinion. In all other respects the report of the referee is confirmed and exceptions will be disposed of accordingly.

Decreed accordingly.

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Matter of the Estate of JOHN W. HAMERSLEY, Deceased.

(Surrogate's Court, New York County, February, 1917.)

Trustees — when commissions allowed to — accounting — Code Civ. Pro. § 2753.

While under section 2753 of the Code of Civil Procedure, as amended in 1916, commissions may be allowed to trustees upon the value of "real property and the increment thereof received, distributed or delivered," a decree entered in a proceeding where trustees are not accounting for real estate may not be amended so as to allow commissions on real estate held by them as part of the trust fund prior to said amendment.

APPLICATION to modify a decree in an accounting proceeding.

Coleridge A. Hart, for trustees.

FOWLER, S. This is an application to modify a decree entered in an accounting proceeding by adding a paragraph allowing the trustees commissions on real estate held by them as part of the trust fund. The real estate was set apart in 1890 to constitute part of the trust fund now held by the trustees. The trust has not terminated. The present accounting does not provide for a distribution of the corpus of the trust fund, nor does it purport to account for the real estate held by the trustees. Section 2753 of the Code of Civil Procedure, as amended by chapter 596 of the Laws of 1916, authorizes the allowance of commissions to trustees upon the value of "any real * * * property, and the increment thereof, received, distributed or delivered." While this amendment would doubtless authorize the

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allowance of commissions on real estate received by trustees subsequently to the date of the amendment, I am inclined to think that it does not authorize the allowance of commissions on real estate received by trustees prior to the date of the amendment unless such trustees are actually accounting for the real estate. In the present proceeding the trustees are not accounting for the real estate, and the application to allow them commissions on such real estate at this time is therefore denied.

Application denied.

Matter of the Estate of CORNELIUS D. DUBOIS, Deceased.

(Surrogate's Court, New York County, February, 1917.)

Transfer tax — what subject to — taxes — partnership — constitutional law — Tax Law as amended in 1915, § 220.

Where a non-resident at the time of his death was a member of a firm whose principal place of business was in the city of New York, the amount of certain profits credited to him on the firm's books but not withdrawn continued to be partnership assets and subject to a transfer tax under section 220 of the Tax Law, as amended in 1915.

The sum paid by the surviving partners under the terms of the partnership agreement to the personal representative of the deceased partner for his interest in all the other assets of the business, including the good will, was also subject to a transfer tax under said section of the Tax Law.

APPEAL from an order assessing the transfer tax.

Lloyd & Maddox (Morris Henry Frank, of counsel), for executors.

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Lafayette B. Gleason (Schuyler C. Carlton ,of counsel), for state comptroller.

FOWLER, S. Decedent died on the 27th day of July, 1915, and at the date of his death he was a member of the firm of Frank & DuBois. The firm's principal place of business was in the city of New York. The decedent had his domicile in the state of New Jersey.

Section 220 of the Tax Law, as amended by chapter 664 of the Laws of 1915, provided that the transfer by a non-resident of " an interest in any partnership business conducted, wholly or partly, within the state of New York " was subject to a tax in this state.

The partnership agreement provided as follows: " Each partner may draw from the profits of the business from time to time as he may desire for his individual use his full share of the profits, provided such profits shall have been actually realized and received by the partnership." In an affidavit filed with the appraiser the executor alleged that prior to the death of the decedent there was a balance to his credit on the books of the firm amounting to $10,528.46, and that this was part of his share of the profits which had not been withdrawn by him. The appraiser included this amount as part of decedent's interest in the firm. The executor contends that it is exempt from taxation.

When the books of the firm were balanced and the profits ascertained and apportioned among the partners the mere entry on the books of the firm to the credit of the decedent's account of the amount of the profits apportioned to him did not effect a separation of such amount from the partnership assets; it continued part of the partnership property until it was actually withdrawn by the decedent. Therefore the property represented by the sum of $10,528.46 stand-

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ing to the credit of the decedent on the books of the firm was at the date of decedent's death partnership property, although the sum represented the decedent's liquidated interest in the partnership profits. It was therefore an interest in the partnership and subject to tax under the provisions of the Tax Law above quoted.

The partnership agreement also provided that in case of the death of either of the partners during the continuance of the partnership agreement there should be paid by the surviving partners to the personal representative of the one so dying, for his share "in all of the other assets of the business, including the good will," a certain sum mentioned in the agreement, the payment to be made in four installments extending over a period of thirty-six months and to be evidenced by the promissory notes of the surviving partners. The amount which the partnership agreement provided should be paid to the personal representatives of the decedent was the sum of $50,000, and the appraiser ascertained the present value of that sum to be $47,170. The order entered on the appraiser's report assessed a tax on this amount. The executor contends that this amount is not taxable. If it was the value of the decedent's interest in the partnership at the time of his death it is subject to a tax under section 220 of the Tax Law. The executor alleges in Schedule B of the affidavit filed with the appraiser that the sum of $47,-170 "is the agreed value of decedent's interest in the firm of Frank & DuBois." The language used by the executor to describe the decedent's interest in the partnership brings such interest within the words of the Tax Law providing for the taxation of a non-resident's interest in a partnership doing business in the state.

The executor also contends that the amendment to section 220 of the Tax Law, which was effected by

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chapter 664 of the Laws of 1915, is unconstitutional. This being a court of first instance, I will assume the constitutionality of the act. Order fixing tax affirmed.

Order affirmed.

Matter of the Estate of ROBERT BENSON, Deceased.

(Surrogate's Court, New York County, February, 1917.)

Transfer tax — who entitled to exemption — taxes — the word "sister" in section 221-a(1) of Tax Law (before amendment of 1916) construed.

The word "sister" in section 221-a(1) of the Tax Law relating to taxable transfers (as it stood prior to the amendment of 1916) does not include one adopted as a daughter by the parents of a decedent, so as to entitle her to the exemption and rate of tax prescribed for a natural sister.

APPEAL from an order assessing the transfer tax.

Bowers & Sands, for executors.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state comptroller.

FOWLER, S. The transfer tax appraiser reported that the value of the bequest given by the decedent to Harriet Goodwin Browne was $54,410.55; that she was a "sister by adoption" of the decedent, and was, therefore, entitled to the exemption and rate of taxation prescribed for transfers of property to the natural sisters of a decedent. From the order entered upon the appraiser's report the state comptroller has taken this appeal.

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It is alleged by the executor that Sarah V. Benson adopted as her daughter Harriet Goodwin Browne. Sarah V. Benson was the mother of the decedent and Harriet Thornburg. The latter was the mother of Harriet Goodwin Browne. Sarah V. Benson, therefore, was the grandmother of Harriet Goodwin Browne, and the latter was a niece of the decedent. She is described in the will of the decedent as his niece. She was adopted by her grandmother, Sarah V. Benson, as her daughter, and the appraiser found that she was a "sister by adoption" of the decedent.

I have been unable to find, either in the Domestic Relations Law or the Transfer Tax Law, any provision of law creating or defining a "sister by adoption." Section 110 of the Domestic Relations Law defines adoption as "the legal act whereby an adult takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor." The relation created by adoption is that of parent and child; there is no provision in the statute for the creation of the relation of brother and sister by adoption.

Section 221-a of the Transfer Tax Law provides that the rate of tax upon all transfers to any "sister * * * or any child or children adopted as such in conformity with the laws of this state, of the decedent * * * shall be one per centum on any amount in excess of $5,000 up to the sum of $50,000." There is no proof that the adoption of Harriet Goodwin Browne by the decedent's mother was in conformity with the laws of this state. As the law specifically provides that in order to entitle an adopted child to the exemption and rate of taxation prescribed for legitimate children there must be proof that such adoption was made in conformity with the laws of this state, it would seem to follow that when the relation-

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ship of the legatee to the decedent is dependent upon the alleged adoption of the legatee by a person other than the decedent, such adoption must also be proved to be in conformity with the laws of this state. The failure of the legatee, therefore, to prove that she was adopted by the mother of the decedent in conformity with the laws of this state would seem to warrant a denial of the contention that she is entitled to the exemption and rate of tax prescribed by statute for natural sisters of the decedent.

Apart from this, however, I am inclined to think that the meaning of the word " sister " in subdivision 1 of section 221-a of the transfer tax statute was not intended by the legislature to include within its signification a person adopted by a decedent's parents. If the legislature had intended that a person adopted by the parent of a decedent should be entitled to the exemption and rate of tax prescribed for natural brothers and sisters, it is reasonable to assume that it would have made express reference to such relationship by adoption, as it had to an adopted child of the decedent. The fact that the legislature specifically provided that a child adopted in conformity with the laws of this state should be entitled to the exemption and rate of tax prescribed for legitimate children of the foster parents, while nothing was said about persons adopted by the parents of a decedent, would seem to indicate that the legislature did not intend to extend to the latter the exemption and rate of taxation provided in subdivision 1 of section 221-a of the Tax Law.

In *Matter of Cook,* 187 N. Y. 253, the court held that a child of an adopted child was a " lineal descendant " of the foster parent within the meaning of those words in the Tax Law, but the reasoning of the court was based upon the provisions of the Domestic Relations Law which provide that an adopted child and his heirs

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shall be entitled to inherit from the foster parent the same as a legitimate child. While section 114 of the Domestic Relations Law provides that an adopted child may inherit from the foster parents in the same manner and to the same extent as a legitimate child of such parents, there is no provision which entitles the adopted child to inherit from the collateral relatives of the foster parent. It has, therefore, been held that an adopted child has no right to inherit through the foster parent from his collateral kin. *Kettell* v. *Baxter,* 50 Misc. Rep. 428. In *Matter of Duryea,* 128 App. Div. 206, the court followed the decision in *Matter of Cook, supra,* by holding that the widow of an adopted son was entitled to the exemption and rate of tax prescribed for the " widow of a son " within the meaning of those words in the Tax Law. The reasoning of those cases, however, does not seem to warrant the conclusion that the word " sister " in the Transfer Tax Law embraces in its signification a female adopted as daughter by the parents of a decedent so as to entitle her to the exemption and rate of tax prescribed by the Tax Law for the natural sister of a decedent.

The order fixing tax will, therefore, be modified so as to provide for taxation of the interest transferred to Harriet Goodwin Browne at the rate prescribed by subdivision 2 of section 221-a of the Tax Law.

Order modified.

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Matter of the Estate of F. AUGUSTUS HEINZE, Deceased.

(Surrogate's Court, Saratoga County, Febrary, 1917.)

Executors and administrators — accounting — when claim for legal services allowed — costs.

Where an administratrix solely for the benefit of the estate and for its preservation has incurred expenses for counsel fees which could properly have been paid from the assets of the estate but for her removal from office on the ground that certain of her individual property claims might be antagonistic to those of the estate, the court, upon her petition for the judicial settlement of her account, which asked that said claim be examined, proved and that any amount allowed be directed to be paid out of the assets in the hands of the present administrator, has full power to do justice between the parties; and where the proof as to the nature and reasonable value of the services rendered by counsel is not disputed, and no one asks that the matter be held for further proof, the claim will be allowed, but any directions as to its priority and payment must await the final decree entered upon the judicial settlement of the accounts of the administrator.

APPLICATION to determine claim for services of attorney.

Hiram C. Todd, for Edgar T. Brackett, claimant.

S. A. McIntyre, for Lida M. Fleitmann.

James A. Leary, for Walter A. Fullerton, administrator.

Sullivan & Cromwell (Ralph Royall, of counsel), for Edwin Gould.

OSTRANDER, S. Decedent was a man reputed to be worth several millions. His property consisted largely

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of mining stocks, properties and royalties from mines. He was also interested in a large sugar plantation in Texas. The mining properties were located in several states in the west, in Alaska, British Columbia, and in the Porcupine District of Canada. Much of his estate was represented by shares of holding corporations, formed under laws of various states, for the purpose of holding and easier dealing in shares and interests in other corporations in which he was interested. Through various complications many corporations and enterprises in which he was interested had, some time before his death, become financially embarrassed, and the greater part of his holdings was either involved in bankruptcy, reorganization or other liquidation proceedings or pledged as security for loans. Many loans were pressing for payment.

A judgment for nearly a million and a quarter dollars had just been recovered against him and required review by the appellate courts. In this situation he died November 4, 1914.

His estate had large potential value, which could be realized, if at all, only by most wise and careful management. The legal, financial and business problems confronting the estate were not only exceedingly complex, but required, in some cases, most immediate solution, since it was certain that his death would precipitate sales of his collaterals. The questions involved were subject to the laws of the courts of many jurisdictions. Pending litigations involved amounts running into millions and threatened the whole assets of the estate. His heir was a helpless infant and creditors required immediate protection through the estate. Such a situation required wise general plans and prompt action to protect the estate.

Mrs. Fleitmann, Heinze's sister, on the evening of

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his death consulted Senator Brackett, who was already somewhat familiar with a part of his affairs. Under his guidance she was appointed administratrix and proceeded with her duties. Very valuable services were performed by him for her, but, before she was able to pay him from the funds of the estate, it was found that certain of her individual property claims might become antagonistic to those of the estate and she was removed from her office. According to the usual practice she was restrained from paying out any funds, required to deliver the assets to her successor and to account. She has filed her account, with a petition, praying settlement thereof. This account states that a claim has been made upon her by Senator Brackett for legal services rendered as aforesaid.

Later, having been sued by Brackett, she filed a petition in the matter of her said accounting, praying that his said claim be examined, proved, and that any amount allowed be directed to be paid out of the assets in the hands of the present administrator. Notice of a hearing of said matter was given to all who had appeared upon the accounting.

Edwin Gould, a creditor, appears specially and questions the jurisdiction of the court to determine this claim: (a) because it is against Mrs. Fleitmann individually, (b) because it is not against the present administrator, either individually or as administrator, (c) because the court has no power to pass upon it until it has been actually paid by her.

He also urges that an order to pay this claim cannot be made except by way of a final decree upon the accounting, and that, therefore, the claim cannot now be determined.

Considering this last objection first: This is comparable to the hearing of contested claims upon the

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accounting, where determination of their validity is made and they are then held and marshaled for payment under the final decree according to their several priorities and to the extent of funds available for their payment. This is precisely the situation here. The examination of this claim is only a step in the accounting proceeding to determine how much the estate should be liable for these services.

We come then to the question of the power of the court to determine this claim before it has been paid by the administratrix who incurred it.

If there is no power in the court to determine such a claim in advance of its actual payment, then where an estate consists solely or principally of realty, if a representative, having no individual means, necessarily employing counsel at a reasonable expense to defend and preserve the estate, should be unable to borrow money on individual credit to pay counsel, and be displaced by death, resignation or removal, before the time for an accounting and sale of the realty to pay debts, etc., the estate would have received valuable services from counsel without any power in the court to reimburse him. Other contingencies can arise where hardship and wrong would result.

The estate has always been the ultimate fund for the payment of such claims and it is conceded to be so in this case. The court has always, finally, had to be arbiter, in case of dispute as to their amount, and this must be so here. Because the administrator was not the agent of the estate, but its owner, while in office, his contracts for such services bound him personally for the full contract price. But such bills were chargeable against the estate only to the extent of their reasonable value to the estate, such as the court should determine. This is the relief asked here — that the court shall

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determine the value of these services to the estate — and that for such amount the estate shall be liable. The old practice gave the administrator no leave to pay such bills from the funds of the estate until his account was settled, but it generally winked at his transgression of the rule. The new statute (Code Civ. Pro. § 2692) expressly permits him to pay from the trust funds, and account later — thus facilitating the payment of such expenses from the estate, but retaining their reasonableness for determination before the action of the representative should become final. While the former practice, in theory, made no allowance to a representative for funeral and administration expenses, which he had not actually paid, the reason was apparent, he should not have credit for what he had not paid.

But in *Ferrin* v. *Myrick,* 41 N. Y. 315, where in an equitable case the Court of Appeals held that the man who furnished a grave stone could not, in an action at law, recover against the administrator, as such, upon a contract made by his predecessor for the stone, the opinion of the court (p. 325) contains this significant passage: "It ought to be added, that in case of the fraud or insolvency of the executor, an equitable cause of action would probably be thereby created against the estate, which could be enforced in behalf of the creditor, and which would enable him to maintain a claim against the estate directly."

In *Austin* v. *Munro,* 47 N. Y. 360, while holding that an action at law could not be maintained against the executors, as such, to recover for legal services rendered to the estate upon a contract of the executors to pay, because the executors were not authorized to bind the estate by executory contract, the court said at page 367: "Whether, by proper allegations, upon an

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amendment, it may be converted into an equitable action to reach funds in the hands of the defendants, the fruits of the litigation in which the services were rendered, or in the alternative for judgment against the defendants personally, may be a question for the pleader, but is not before this court."

These cases, while not entitled to weight as precedents, suggest that in some tribunal equity could reach assets of the estate in favor of one who had furnished property or services for which the estate should in good conscience be liable.

The court in *Matter of Smith,* 111 App. Div. 23; *Matter of Wood,* 170 id. 533, determined the value of the services of attorneys who had appeared for the representatives in administration of the estate, before payment by the representatives, and against their consent, upon the theory that the attorneys' lien for services under the statute must be fixed as a preliminary to settlement of the estate. *Matter of Rabell,* 175 App. Div. 345, was similar in the facts though the opinion does not indicate that stress was laid upon the question of enforcement of a lien. The Brackett services were by way of counsel and not as attorney of record, and may not, perhaps, be the subject of a lien.

In the case at bar the administratrix incurred expenses for counsel fees for the preservation of the estate. They do not appear to have been at all for her benefit but solely for the benefit of the estate. She had property of the estate which she could properly have applied to their payment had not the court by her removal taken the funds from her possession. As the evidence now stands putting upon her the burden of raising and carrying indefinitely from her own resources a large sum of money to pay this claim

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which must ultimately be returned to her from the estate before determining its value to the estate would be unfair. At some time this court must fix the amount for which the estate shall be liable for these services. Under the peculiar circumstances of this case, it is not necessary that Mrs. Fleitmann shall have actually paid them. The Code (§ 2510) confers upon the court full equity jurisdiction to do justice between all the parties before it in this proceeding. This is limited (*Matter of Holzworth*, 166 App. Div. 150; 215 N. Y. 700) only by the restrictions contained in the latter paragraph of that section that "in the cases and in the manner prescribed by statute" it shall (subd. 3) settle the "accounts of executors, administrators," etc., and (subd. 4) "Enforce * * * the distribution of the estates of decedents." The statute (Code Civ. Pro. § 2692) does not prohibit, even by inference, the determination of an amount due counsel, which the representative does not ask to have allowed as a credit to her. Having been deprived of the fund with which her personal liability to counsel might have been paid or reduced, she has a substantial interest in having paid from that such sum as may be just.

She has given evidence of the nature and value of these services. No one has disputed this proof by a syllable of evidence. The case was rested by every party in interest upon this proof. No one has asked upon the trial to have the matter held for any further proof.

Considering among other things the difficulties confronting the administratrix, the apparent magnitude and complexity of the interest involved, and the high standing and experience of her counsel, I think the

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claim presented is not unreasonable and should be allowed.

Directions as to its priority and payment must await the final decree upon this accounting.

Should subsequently discovered facts make payment of this claim inequitable and unjust, the changed situation can be cared for upon framing the final decree upon the accounting.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Estate of WILLIAM KOHLER, Deceased.

(Surrogate's Court, Sullivan County, February, 1917.)

Costs — when application for, denied — executors and administrators — accounting — attorneys.

Where a disputed claim for $340 for board and care of decedent's infant daughter was submitted to the surrogate for determination upon the judicial settlement of the accounts of the administratrix, and the claimant was allowed $320, no claim being made that the original claim was unreasonably rejected or resisted, an application by the attorney for claimant for an allowance of costs will be denied.

APPLICATION for allowance of costs to attorney for claimant on trial of rejected claim in Surrogate's Court.

Robert B. McGinn, for claimant.

Joseph Rosch, opposed.

SMITH, S. In the course of the administration of this estate Conrad Ruppert presented a claim to the administratrix for board and care of an infant daugh-

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ter of deceased amounting to the sum of $340. The claim was rejected by the administratrix and with the notice of rejection she filed an order to submit it to the surrogate for determination on the final settlement of her accounts. The consent was made December 24, 1915, and the claimant on January 8, 1916, also filed his consent that the matter be determined by the surrogate on the final settlement. The disputed claim was thereafter heard and was allowed at the sum of $320. The attorney for claimant now moves for an allowance to him for costs and his application is opposed on behalf of the estate. There is no claim that the account was unreasonably rejected or its payment unreasonably resisted or neglected. In fact such a claim could not well be urged because of the nature of the claim presented, even though the court upon the evidence allowed it at practically its full amount. The precise question here then is: Should the Surrogate's Court allow costs to the attorney for the claimant, whose claim has been rejected by the representative of the estate, in a case where the claimant has been successful, although no claim is made that it was unreasonably rejected or resisted?

There seems to be no doubt that under both the former and the present practice the allowance of costs in such a case is in the discretion of the surrogate. Code Civ. Pro. § 2743; former section 2561; *Matter of Coonley,* 38 Misc. Rep. 219; *Matter of Ingraham,* 35 id. 577.

But under the former practice in case an action was brought pursuant to section 1822 of the Code costs could be allowed only as provided by sections 1835 and 1836. These provisions did not include a case where a defendant filed a consent to submit the claim to the surrogate for decision on the final settlement;

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and it was held by Davie, Surrogate, in *Matter of Ingraham, supra,* that no allowance of costs in Surrogate's Court should be made when the claimant could not have recovered them in case he had brought an action. The reasoning of the learned surrogate in that case was questioned by Judge Tallmadge in the *Coonley* case, in which he held that the surrogate should determine the question as a matter of discretion and without any reference to the provisions of sections 1822 and 1835 and 1836. Under the present provisions of the Code covering this question "If the executor or administrator doubts the justice or validity of any claim presented to him, he shall serve a notice in writing upon the claimant that he rejects said claim, or some part of it, which he specifies. Unless the claimant shall commence an action for the recovery thereof against the executor or administrator within three months after the rejection, or, if no part of the debt is then due, within two months after a part thereof becomes due, said claimant, and all persons claiming under him, are forever barred from maintaining such action, and in such case said claim shall be tried and determined upon the judicial settlement." Where an action is brought, no costs can be allowed except upon the certificate of the justice presiding at the trial to the effect that the payment of the claim was unreasonably resisted or neglected. Why should a different rule prevail where the claim is tried in Surrogate's Court? If the representative of an estate has any good reason to doubt the justice or validity of a claim, it is his duty to reject it and put the claimant to his proof to substantiate it. Experience in the settlement of estates has shown a strong tendency to interpose stale and questionable claims against the estates of deceased persons. Frequently the claims are of

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such a nature as to negative the idea that they would have been presented to the decedent in his lifetime. When, as sometimes happens, there are several claims of doubtful justice, but small in amount, the representative is inclined to allow them as presented rather than have the trouble and expense of a contest. I think that the representative of a deceased person's estate should have a free hand in the investigation and rejection of claims presented against it, holding him responsible for unreasonably disputing or rejecting a claim by charging him personally with the payment of costs, which can be done under section 2744 of the Code.

These views lead to a denial of the application of claimant's attorney for an allowance of costs in this proceeding. A decree on the settlement may be entered accordingly.

Decreed accordingly.

NELLIE MINERS, Plaintiff *v.* MAX AUSFRESSER and HYMAN FIELDER, Defendants.

(City Court of the City of New York, Trial Term, February, 1917.)

Negligence — action for injuries — evidence — trial — pleading — when motion for new trial and to vacate order dismissing complaint denied.

Where in a negligence action for injuries sustained by falling into a coal hole in front of defendants' premises plaintiff testified that as she was passing along the street she stepped on something, felt herself falling, then landed on her right elbow, with her right leg in a coal-hole up to her knee, and that at the same time the cover of the coal-hole, as to the situation of which at any time prior to the accident there was no evidence, flew off and to a distance of about two feet. *Held*, that the

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mere happening of the accident raised no presumption of negligence.

That it was incumbent on plaintiff to show negligence and either actual or constructive notice to defendants of a prior dangerous condition of the sidewalk, and a motion for a new trial and to vacate an order dismissing the complaint at the close of plaintiff's case will be denied.

MOTION for a new trial and to vacate an order dismissing complaint at the close of plaintiff's case.

Samuel Jesse Buzzell, for plaintiff.

Amos H. Stephens, for defendants.

LA FETRA, J. This is a motion for a new trial and to vacate an order dismissing the complaint at the close of plaintiff's case. The plaintiff lived in Brooklyn, and in the afternoon of December 9, 1914, on her way to visit her parents, while passing along Norfolk street, fell into a coal-hole in front of No. 79 Norfolk street. She says she stepped on something, felt herself falling, then landed on her right elbow, with her right limb in the coal-hole up to her knee. At the same time the coal-hole cover flew off and to a distance of about two feet. By the election of counsel, and within the pleadings, the action proceeded as one of negligence and not on the theory that the defendant was maintaining a nuisance. The mere happening of this accident did not raise the presumption of negligence. It was incumbent upon plaintiff to show negligence and, in addition, either actual or constructive notice to the defendants of a prior dangerous condition. If the dangerous situation had lasted for a considerable length of time sufficient to infer a breach of duty in respect to the public in violation of the permission granted to obstruct the highway, then the action might

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have proceeded under the doctrine of a nuisance. *Hartman* v. *Lowenstein*, 90 Misc. Rep. 686; *Zorn* v. *City of New York*, 85 id. 45; *Jorgensen* v. *Squires*, 144 N. Y. 280; *Tinker* v. *New York, O. & W. R. Co.*, 157 id. 312; *Johnson* v. *City of New York*, 186 id. 139; *Deshong* v. *City of New York*, 176 id. 482, and notes thereon reported in 14 N. Y. Ann. Cas. 159; *Mahoney* v. *City of New York*, 145 App. Div. 884; *City of New York* v. *Hearst*, 142 id. 343, 346, 347. An early case upon the subject was *Clifford* v. *Dam*, 81 N. Y. 52, in which a recovery in favor of plaintiff was sustained on appeal. The obstruction was considered *prima facie* a nuisance, and evidence of the usual permit authorizing the same in the public highway was deemed inadmissible principally because it was not pleaded by way of a defense by the defendant. The obstruction was a coal-hole covered with an iron disc which fitted into a groove, and in front of defendant's premises in the city of New York. The plaintiff in passing stepped upon the disc; it fell off, and he was precipitated into the vault below. Chief Judge Church, in writing the opinion, said: "When permission is given by a municipal authority, to interfere with a street solely for private use and convenience in no way connected with the public use, the person obtaining such permission must see to it that the street is restored to its original safety and usefulness. Whatever the plaintiff is required to prove to establish his cause of action, the defendant may disprove under a general denial. This is the general rule. Applying that rule it is quite clear that the plaintiff was not bound to prove, in the first instance, anything except the existence of a hole in the sidewalk for which the defendants were responsible, and that in passing along the sidewalk he fell into it. It was not even necessary,

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in the first instance that he should prove a want of contributory negligence, for the reason that the action is not founded upon negligence, but upon a wrongful act. If there was any justification for the act, it was incumbent upon the defendants to allege and prove it." In *Martin* v. *Pettit*, 117 N. Y. 118, the complaint charged the defendant with negligence, the trial proceeded only upon that theory and not upon the claim that defendant was maintaining a nuisance. The plaintiff fell down a flight of steps leading from a street in the city of New York, down an areaway to the cellar below. The steps were protected by an iron grating which was lifted during the rounds of a watchman in charge of the premises and without his knowledge. Judge Gray, in writing the opinion, said: "The defendant is not to be deemed liable for the consequences to a stranger of the wanton or careless act of some other person, not in his employ. He was shown to have done all that a careful man could have done to guard the approach to the tenant's premises, pending the completion of the permanent doors which he was to furnish. Unless he, or some one for him, had stationed himself, through all the hours, upon the steps, I do not see what more could have been done. The occurrence was one which might as well have happened had the permanent doors been on, and the tenant or his servants had left them open. * * * There is absolutely nothing to show that any more effective device could have been adopted under the circumstances of the case. The closest sifting of the evidence leaves no residuum, out of which the jury could fairly extract any inference of neglect on the defendant's part. This is a case where the law can grant no relief to the plaintiff against the defendant; for the only ground is, in reality, that he is the owner of the premises. In all cases where it is sought to hold

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the owner of property liable for injuries, occurring to a stranger on the ground of negligence, there must be evidence in the case that he was guilty of some act of omission, or commission, from which a jury might reasonably infer fault on his part. Nothing less than that will satisfy the demands of the rule of law in such cases. The law is reasonable, and does not demand of an owner of property more than the exercise of ordinary care, with respect to the rights of third persons." In *Babbage* v. *Powers,* 130 N. Y. 281, a vault was covered with flagstones forming the sidewalk of a street in the city of Rochester, and while plaintiff was passing one of these gave way and he fell through into the vault underneath. The vault had been in use for nine years and was constructed and maintained with full knowledge of the city officials. It was held that plaintiff was properly nonsuited; that consent to its construction was to be inferred from the acquiescence of the city officials having charge of the street and power to give such consent; that in the absence of a statute regulating the subject a written consent was not requisite — a verbal one was sufficient. Judge Vann said: "Assuming, however, the rule to be as stated in the *Congreve cases, supra,* when the excavation is made without authority (*Clifford* v. *Dam,* 81 N. Y. 52, 56), it is clear that when it is made with the consent of the proper municipal officers, the rule of liability relaxes its severity and rests upon the ordinary principles governing actions of negligence. The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard." In *Maldosky* v. *Germania Bank,* 127 N. Y. Supp. 292, the uncontradicted testimony showed the coal-hole cover had been broken a few minutes

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before the plaintiff sustained the injuries complained of by the striking of a metal ash can, which had fallen from a cart on which it had been loaded shortly before. Thus the cover was broken and became unprotected and dangerous. The court held that the submission of the case to the jury was error, saying: "It can only be considered sufficient to sustain this third allegation on the assumption that the law imposes on the defendant the duty of giving adequate warning to pedestrians using the street on the instant when such a defect occurs. But that assumption is not the law. The law cannot impose an impossibility, and such an obligation would be impossible of performance. It is well settled law that some length of time, reasonable under the circumstances, must elapse in which defendant should take notice of the defect before liability for injuries occasioned by the dangerous condition resulting from the defect can be imputed to one in the position of the defendant." The facts in the case at bar are somewhat parallel to those found in *Ornstein* v. *Unterman,* 159 N. Y. Supp. 636. It was brought to recover for injuries sustained through the falling of a cellar door in a cellarway appurtenant to defendant's premises in a public street, negligently permitted to be open and not properly guarded, there being no evidence that the defendant opened it or knew of its being open, or that it was open long enough to charge him with notice. The court held that negligence was not sufficiently proven, reversed the judgment in favor of plaintiff, and said: "The point was repeatedly urged by defendant's counsel that, 'before defendant could be held responsible, the jury must be satisfied that the defendant had notice that this cellar door was open,' and to the refusal to so charge the defendant took due exception. There was no direct proof in the case that the door had been opened by the defendant, and none

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from which that fact could be inferred. Nor was there any proof that, assuming the door had been opened by some third party, defendant was aware of the fact, or that the condition had existed a sufficient length of time to charge him with constructive notice. While it is quite true that, if any one of the forms of negligence just indicated had been proved as against defendant, the action might still have been maintained as upon nuisance, because the condition thus negligently brought about existed in a public street, nevertheless such negligence must have been proved as in any other case." In *Brady* v. *Shepard,* 42 App. Div. 25, a judgment in favor of plaintiff was reversed on appeal. The facts were more nearly like those in the case at bar, but there it appeared that just prior to the accident a coal company, in no way connected with defendant, had delivered coal to the premises, whereas here evidence is entirely lacking as to the situation at any time prior to plaintiff receiving her fall. The citations relied upon by plaintiff as authority requiring submission of the facts to a jury do not apply. They involve the question of the maintenance of a nuisance, as, for instance, *Moser* v. *Legniti,* 76 Misc. Rep. 216, where the court said: "The plaintiff claims that she was injured by falling down a coal-hole on the sidewalk appurtenant to premises owned and controlled by defendant. The complaint is susceptible of interpretation as alleging a cause of action based either on nuisance or negligence, and the defendant at no time requested any election or explanation of the theory upon which the complaint is based." The motion is denied.

Motion denied.

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Matter of Proving the Last Will and Testament of ABBY STRONG, Deceased.

(Supreme Court, Schenectady County, July, 1916.*)

Wills — action to determine validity of — trial — evidence — codicil — undue influence — when verdict in favor of proponents directed — Code Civ. Pro. § 2538.

Where in an action under section 2538 of the Code of Civil Procedure to determine the validity of a last will the jury is unable to agree, the court has power to direct a verdict.

Upon the trial of such an action it was conclusively shown that the codicil to the will was executed with all the formalities required by statute and there was no sufficient evidence of undue influence to justify the submission of that question to the jury, and while the testimony disclosed many odd, unnatural and irrational acts of testatrix these acts were not continuous, and it was established beyond dispute that during many and long periods subsequent to the time the codicil was executed testatrix was entirely rational and of full understanding mind. Not only was there no evidence from which an inference could be drawn, at least by a layman, that testatrix was in an incompetent condition on October 20, 1910, the day she executed the codicil, but it was conclusively established that from October 16, 1910, until after October 20, 1910, she was in her normal and rational state of mind, conversant with her affairs and competent to look after them. Each of the subscribing witnesses, one of whom was a physician, relating in substance what occurred at the time of the execution of said codicil, testified that testatrix at that time was competent. Of four alienists called to testify as to her condition on that day two stated that in their opinion she was competent and the other two that she was incompetent. The question directed by the surrogate to be tried in the action was whether at the time of making said codicil testatrix was of sound mind and memory and capable of making the instrument. The jury disagreed and upon the court entertaining a motion by proponents for the direction of a verdict it was stipulated by the parties before the jury

* Received too late for insertion in proper place.— [REPR.

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was discharged that the motion might be retained and that the court might direct a verdict in all respects as if the jury were present, whereupon the jury was discharged. *Held*, that the court having power to direct a verdict should do so and that accordingly a verdict in favor of proponents will be directed, establishing the validity of the will and codicil.

ACTION under section 2538 of the Code of Civil Procedure to determine the validity of a will.

Edgar T. Brackett, William E. Bennett, Arthur King and E. D. Cutler, for proponents.

John D. Miller and Daniel Naylon, Jr., for contestants.

VAN KIRK, J. This action was tried in pursuance of an order of the surrogate of Schenectady county. Four questions were ordered to the Supreme Court under the provisions of section 2538 of the Code of Civil Procedure. At the close of the evidence a motion was made by the proponents for the direction of a verdict, but the questions were submitted to the jury. The jury reported that they were unable to agree, when the proponents renewed their motion for a direction of a verdict. The court entertained the motion, and it was then stipulated by the parties and before the jury was discharged from its consideration of the case that the motion might be retained; and, if the court should conclude so to do, that it might direct a verdict in all respects as if the jury were present. Thereupon the jury was discharged.

The court has the power to direct a verdict. Section 2538 of the Code of Civil Procedure provides for the trial by jury: "In any proceeding for the probate of a will in which any controverted question of fact arises, the surrogate * * * must direct that such trial be had" either in the Surrogate's Court or in

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the Supreme or County Courts. "If the trial shall not take place in the surrogate's court the order must state distinctly and plainly each question of fact to be tried, and shall be the only authority necessary for the trial of such question." In 1892 section 2653a of the Code was enacted, directing in what manner the validity of a will could be tried before a jury and an action brought by any person interested as devisee, legatee or otherwise. In that section is this language: "It (the issue) shall be tried by a jury and a verdict thereon shall be conclusive." It was claimed under that section that the court had not authority to direct a verdict; but in *Hawke* v. *Hawke*, 82 Hun 439; affd., without opinion, 146 N. Y. 366, it was held that the court had the same power, duty and control in the trial as in the trial of other actions; and said, quoting from 20 N. Y. 70: "The duty of the judge presiding at the trial is the same in this class of cases as in others; it is to determine whether a case is presented fit for the deliberation of the jury." This construction of section 2653a was uniformly followed and is undoubtedly the construction that should be put on the above section of the Code of Civil Procedure.

The court may direct a verdict after the case has been once submitted to a jury and it has reported its inability to agree and before the jury is discharged. *Rainger* v. *Boston Mutual Life Association*, 167 Mass. 109; *Heath* v. *Jaquith*, 68 Maine, 433; *McDonald* v. *Metropolitan St. R. Co.*, 46 App. Div. 143, 145; reversed on other grounds, 167 N. Y. 66; *Butler* v. *Supreme Council*, 43 App. Div. 531. In the last case the trial court had submitted the question to the jury, which, after being out some time, reported that it was unable to agree. The court then announced that it would dismiss the complaint, to which the plaintiff's attorney duly excepted and an appeal was taken. Judge Wood-

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ward says, on page 532: "While the proceeding on the part of the learned trial court was somewhat extraordinary, there does not appear to be any good reason why the court could not grant the motion of the defendant for the direction of a verdict or a dismissal of the complaint at any time before the jury had acted, if the evidence was not sufficient to justify a verdict for the plaintiff."

The court should direct a verdict in this case. In *Linkhauf* v. *Lombard,* 137 N. Y. 426, the Court of Appeals said: "The rule should be regarded as settled, under all the authorities, as well by the decisions of the courts of this state as by those of England, that, where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side, that a verdict contrary to it would be set aside, it is the duty of the trial judge to non-suit, or to direct the verdict, as the case may require;" citing a number of cases, among them *Dwight* v. *Germania Life Ins. Co.,* 103 N. Y. 341. *Dobie* v. *Armstrong,* 160 N. Y. 584, is the leading case as to the direction of a verdict in will cases. It holds that the trial court is not required to submit the testator's mental capacity to the jury merely because there was some evidence of incapacity. "A solemn testamentary disposition of property should not be left to the decision of a jury upon mere surmise, or upon inferences from facts, which are as consistent with one view as with the other;" citing *Linkhauf* v. *Lombard,* and quoting the rule above stated. The decision of the Appellate Division in *Hagan* v. *Sone,* 68 App. Div. 60, was reversed (174 N. Y. 323), where Judge O'Brien, writing for the court, says: (p. 319): "If there was no evidence, or if there was merely a scintilla, then the ruling of the learned trial judge was correct and should be sustained, but if, on the con-

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trary, there was some proof in support of the allegations of the complaint, or which tended in that direction, then the case should have been decided by the jury as one of fact and not by the court as one involving only the question of law." The conclusion reached by Judge O'Brien is: "When evidence is given of such a character that different inferences may fairly and reasonably be drawn from it, the fact must be determined by the jury." *McDonald* v. *Metropolitan St. R. Co.*, 167 N. Y. 66, has been recognized as re-establishing the "scintilla of evidence" rule; and it has been applied especially in negligence cases. The trial courts and the Appellate Division had generally accepted this as a modification of the rule stated in the *Linkhauf* case. In *Pettit* v. *Pettit*, 149 App. Div. 485, 488, the court said: "Upon the question of whether the testator had testamentary capacity at the time the will was executed it may be, under the doctrine of *McDonald* v. *Metropolitan St. R. Co.* (167 N. Y. 66) and *Hagan* v. *Sone* (174 id. 317), that the case had to be submitted to the jury, but its finding that he did not have testamentary capacity is, I think, clearly against the weight of evidence." In *Philips* v. *Philips*, 77 App. Div. 113, 115, Judge O'Brien in the first department, after referring to *Dobie* v. *Armstrong*, says: "And the conclusion reached in that case was that the evidence produced by the contestant 'was not of a nature that the jury could have properly proceeded to find a verdict upon it in his behalf, and, further, that, if such a verdict had been rendered, it could not have stood the test of a motion addressed to the court to set it aside.' The force of this last statement had been destroyed by the later case of *McDonald* v. *Metropolitan St. R. Co.* (167 N. Y. 66)." But in *Matter of Case*, 214 N. Y. 199, the Court of Appeals has corrected this wrong impression. On page 203, Judge Car-

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dozo, speaking for the court, says: "It is true that where conflicting inferences may not unreasonably be drawn, the weight of evidence is not for consideration in this court. It is still the rule, however, even in this court, that 'insufficient evidence is, in the eye of the law, no evidence' (*Pollock* v. *Pollock*, 71 N. Y. 137, 153; *Laidlaw* v. *Sage*, 158 N. Y. 73, 94; *Fealey* v. *Bull*, 163 N. Y. 397, 402). In the words of Maule, J., in *Jewell* v. *Parr* (13 C. B. 916), 'When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established.' * * * Rightly read, the case of *McDonald* v. *Met. St. Ry. Co.*, (167 N. Y. 66), holds nothing to the contrary." In *Laidlaw* v. *Sage*, so cited, Judge Martin, who also wrote the opinion in the *McDonald* case, quotes extensively from the *Linkhauf* case. Judge Cullen, in *Fealey* v. *Bull*, *supra*, in discussing the direction of a verdict, says: "There must be not only some evidence, but the evidence must be sufficient in its nature to warrant the court in submitting a cause to the jury. * * * But the rule also applies to cases of direct evidence. The testimony of a witness may be in such contradiction of matters of common knowledge, or the laws of nature, as to be incredible as a matter of law." In the *Linkhauf Case*, *supra*, 425, the court said, quoting from *Improvement Company* v. *Munson*, 14 Wall. 442, as follows: "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge

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was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof rests." Since the decision in *Matter of Case,* I believe the rule first above quoted from the *Linkhauf* case, and applied in *Dobie* v. *Armstrong,* is the approved rule in this state in probate cases, and the application of that rule in *Dobie* v. *Armstrong* is now unquestioned.

The question directed by the surrogate to be tried, which is for consideration here, is: "Was the said Abby Strong, at the time of the making of the said paper propounded as a codicil to her will, which paper bears date of the 20th day of October, 1910, of sound mind and memory and capable of making such codicil?" Omitting now from consideration the testimony of the experts, it seems to me plain that there is not any evidence which requires this question to be submitted to the jury. While the evidence discloses many odd, unnatural and irrational acts of Abby Strong, these acts are not continuous, and it is established beyond any dispute that, during many and long periods, subsequent to the time this will was executed, she was entirely rational and of full understanding mind; and there is absolutely no evidence in the case from which it could be inferred at least by a layman that, on October twentieth, she was in an incompetent condition. "A drunkard is not incompetent like an idiot or one generally insane. He is simply incompetent upon proof that at the time of the act challenged his understanding was clouded or his reason dethroned by actual intoxication. *Peck* v. *Cary,* 27 N. Y. 9." *Van*

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Wyck v. *Brasher,* 81 N. Y. 260. The evidence establishes affirmatively and without any dispute better than a surmise that, from the sixteenth of October until after the twentieth of October, Abby Strong was in her normal and rational state of mind, conversant with her affairs and competent to look after them. While the evidence may justify, as a fair and reasonable inference, a finding that she was incompetent during the "spells," it does not fairly and reasonably justify an inference that she was generally insane or incompetent. See *Cook* v. *White,* 43 App. Div. 388, 391. The two subscribing witnesses, Mr. Lyon and Dr. Vanderbogert, each testified that she was competent. They related, not in much detail, what had occurred at the time the codicil was executed, but perhaps in as much detail as men could recall five years after an event. Abby Strong was in her bed when the witnesses went to the room. She was asked if she would have a book on which to sign the paper, and she said, No, she would get up. She did get up from her bed, went to the table and signed the instrument in her usual natural hand, and all the formalities for the execution of the codicil were performed. Dr. Vanderbogert had been her physician for a considerable time, although he had apparently not constantly attended her for a few months prior to October twentieth. Dr. Vanderbogert, according to an entry in Dr. Pierson's appointment book, attended her the same day in consultation with Dr. Pierson, and being present at the time of the execution of the codicil in the evening he positively testifies that at the time she was competent. Drs. Lamb and Mosher, alienists, in answer to a hypothetical question, which recited with great fullness the story made in the evidence, including not only the odd and unusual acts of Abby Strong, her failures of memory, her repetition of stories, her spells, her physical

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ailments, but also the other side of the picture as related by witnesses called by the proponents, stated that in their opinion she was of sound mind on October twentieth. Drs. Scott and Pashayan were called by the contestants. The hypothetical question asked them did not include the great body of the proponents' testimony, which had not yet been put in the case. The question was chiefly confined to those acts and conversations of Abby Strong, which had been denominated by the witnesses as irrational, and her physical ailments. In answer to such question, each stated in his opinion she was incompetent at the time she made her codicil; and Dr. Scott at least testified that, in answering the question, he assumed that, in all other acts and conversations of her life, she was rational. It is conceded that, in 1906, when she made her will, she was competent. If she was incompetent on October 20, 1910, it was because she had then come into a permanently enfeebled condition of mind. The recitals in the hypothetical question to the contestants' experts might give the impression that the irrational acts and sayings and evidences of an enfeebled condition were continuous, when, in fact, they were distributed through a period of nine or ten years. The spells, so called, were more frequent in 1910 and during and following the last illness of her sister Jerusha. Later in her life they were not so frequent. When we consider that many witnesses, entirely credible and intelligent, have shown that, in many periods of time, up to the end of 1913, she was competent and rational, we seem to have a complete answer to any contention that her mind was permanently impaired as early as 1910. So that, unless the fact that two alienists have testified that she was incompetent on the evening of October 20, 1910, requires the submission of the question to the jury in any event, the court should direct a verdict.

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There are expressions of our courts with regard to the testimony of experts based upon hypothetical questions, stating that their credibility and the weight of their testimony are for the jury (*Heyser* v. *Morris,* 110 App. Div. 313); and at the same time there are many cases reported in which verdicts have been directed sustaining a will where experts have testified that the testator was incompetent. *Dobie* v. *Armstrong,* 27 App. Div. 520; 160 N. Y. 584; *Hawke* v. *Hawke,* 82 Hun, 439; affd., 146 N. Y. 366; *Philips* v. *Philips,* 77 App. Div. 113. The testimony of experts, who have not seen the testator and whose opinions are based upon hypothetical questions, is of the weakest and most unsatisfactory character. *Phillips* v. *Chater,* 1 Dem. 533, 546. In *Byrne* v. *Byrne,* 109 App. Div. 476, 480, it is said: "Differing from us, the Court of Appeals in *Hagan* v. *Sone* (174 N. Y. 319) expressly held that expert evidence of the character introduced in this case was admissible and should have been left to the jury for their consideration, saying that the value and bearing of the evidence, as well as its construction, is for the body to which is committed the decision of all questions of fact." This should not be taken as a holding that in all cases the testimony of experts must be submitted to the jury. Judge O'Brien, in *Hagan* v. *Sone,* refers to *Dobie* v. *Armstrong,* but does not criticize the holding of the court there in sustaining the direction of the verdict, though in conflict with the expert testimony. He does refer to expert evidence and says in that case it was of a character to be submitted to the jury, but does not suggest that in all cases it should be. And Judge O'Brien does say, after referring considerably to the evidence, this: "We express no opinion as to the merits of the case, or as to the weight or value of the evidence. We only say

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that in our opinion there was some evidence which should have been submitted to the jury, since it tended to support the allegations of the complaint. Wills are not to be set aside by juries except for the gravest reasons. A person has the right to dispose of his property in such way and to such persons as he thinks best. It is only in a case where there is substantial proof of mental incapacity or of undue influence, that courts *or juries* may annul his testamentary act." In *Philips* v. *Philips, supra;* affd., without opinion, 179 N. Y. 585, the plaintiff produced three medical experts, upon which he relied as presenting a *prima facie* case showing testamentary incapacity; still, after apparently holding that the rule of *Dobie* v. *Armstrong* had been changed by *McDonald* v. *Met. St. Ry. Co.,* the court says: "It appeared without contradiction that the opinions of the experts, upon which the plaintiff's case rested, resulted from an erroneous diagnosis and the erroneous assumption of facts, which destroyed the probative force of such opinions and left the plaintiff's case barren of any evidence sufficient to justify the submission of the issue of fact to the jury as to the testator's mental incapacity." And he says: "The mere opinions of expert witnesses based upon an erroneous hypothesis cannot prevail as against facts when testified to, as in this case, by a great number of competent observers. *Buchanan* v. *Belsey,* 65 App. Div. 62; *Delafield* v. *Parish,* 25 N. Y. 29; *Hagan* v. *Sone,* 68 App. Div. 60." In *Griswold* v. *N. Y. C. & H. R. R. Co.,* 115 N. Y. 64, Judge Finch said: "Medicine is very far from being an exact science. At the best, its diagnosis is little more than a guess enlightened by experience. * * * and the wisest physician can do no more than form an opinion based upon a reasonable probability." In *Pettit* v. *Pettit, supra,* 490, Judge

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McLaughlin said, after reciting certain reasons why the testator was competent: "One who has such intelligence, has testamentary capacity (*Delafield* v. *Parish*, 25 N. Y. 9; *Matter of Martin*, 98 id. 193; *Dobie* v. *Armstrong, supra; Ivison* v. *Ivison*, 80 App. Div. 599), and the proof of experts based upon a hypothetical question in opposition to proof showing such intelligence, scarcely, if at all, raises an issue for a jury."

The answer of the contestants' experts to the hypothetical question in the form in which it was made, not reciting the evidence as to the many times later when Abby Strong was apparently of normal mind, and the fact that neither of the physicians testified that, in their opinion, she had come to a condition of continuous mental incompetency prior to October, 1910, seems to me to show that the answers of the experts resulted from an erroneous assumption of facts which destroyed the probative force of their opinions. Abby Strong had sufficient intelligence to look after her own affairs until the end of 1913. She knew who her relatives were; and though, at times, she did not identify them by name, yet, as soon as she was reminded, her conversations always showed full comprehension. She knew what her property was and took care of it, receiving interest and giving proper receipts therefor. She purchased supplies for the house and ordered repairs; she paid her bills, and did her own business generally. She made a codicil which was in harmony with the acts of her life; she made her bequests to those to whom she had often contributed during her life. Considering the distant relationships, having none closer than second cousins, her codicil was not an unnatural codicil. The disposition is of the same character as that in her will, which is concededly valid. She made her codicil about six months after the decease of her sister and then allowed that codicil to stand for five

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years before her death, during most of which period she was looking after her own affairs and frequently during which period she made gifts of money to those same institutions and for those same purposes which she remembered in her codicil. It seems to me that a person who has such intelligence as it was disclosed that she had at all times except when suffering from spells has testamentary capacity, and that the question whether she has or not should not be left to surmise. While juries are permitted to draw reasonable inferences from facts shown to exist, those inferences may not be mere guesses or surmises, and I am unable to recall any evidence, from which, by anything better than a guess, it could be found that, on October 20, 1910, she was incompetent to make a will. "To permit a jury to speculate and surmise upon a question of responsibility (mental capacity) is to withdraw from the litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the courts upon questions, to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced." *Linkhauf* v. *Lombard, supra,* 425. The final words of Judge Gray in *Dobie* v. *Armstrong* are alike applicable to this case: "I think that the evidence produced by the contestant was not of a nature that the jury could have properly proceeded to find a verdict upon it in his behalf and, further, that, if such a verdict had been rendered, it could not have stood the test of a motion addressed to the court to set it aside." The same reasoning of Judge Cullen in *Cook* v. *White, supra,* (affd., 167 N. Y. 588), pp. 391, 392, applies to this case.

The evidence shows conclusively that the will was executed with all the formalities required by the statute, and there is no sufficient evidence of undue

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influence to justify the submission of that question to the jury. Undue influence must be established by showing the facts and circumstances justifying the inferences, and opportunity is not enough. *Children's Aid Soc.* v. *Loveridge*, 70 N. Y. 394; *Thompson* v. *Peterson*, 152 App. Div. 667, 672. A verdict in favor of the proponents should be directed.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff *v.* MICHAEL CERRATO, Defendant

(Court of General Sessions of the Peace, in and for the County of New York, December, 1916.*)

Indictment — allegations contained in — demurrer to, when disallowed — false representations — grand larceny — criminal law.

It is well settled that a false pretense or representation, as understood in the criminal law, must relate to a past or present fact and not be the basis of an opinion, promise, or profession of purpose.

Allegations in an indictment charging grand larceny in the second degree by means of false pretensions and representations, that defendant represented that he was able to have persons excused and exempted from military duty in the Italian army, and that he could and would have the complaining witness so excused, are but an expression of opinion and a promise and intention on defendant's part to obtain the exemption of said witness from such military service and do not constitute false pretenses and representations as understood in the criminal law, but where it is also alleged that defendant falsely represented that he was connected with and authorized to act for the Italian consul in the city of New York the indictment is good on demurrer.

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* Received too late for insertion in proper place.—[REPR.

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Misc.] Court of Gen. Sessions, N. Y. County, December, 1916.

DEMURRER to an indictment.

Don Carlos Buell, Deputy Assistant District Attorney, for people.

Charles Novello, for defendant.

ROSALSKY, J. The indictment filed against the defendant contains two counts, the first charging the crime of grand larceny in the second degree by means of false pretenses and representations, and the second charging the crime as at common law.

The false pretenses alleged in the indictment are the following: (1) That he, the said Michael Cerrato, was connected with and authorized to act for the Italian consul in the city of New York; (2) that he, the said Michael Cerrato, was able to have persons excused and exempted from military duty in the Italian army; and (3) that he, the said Michael Cerrato, could and would have him, the said Thomas Scotti, excused and exempted from military duty in the Italian army.

The defendant demurs to the indictment, upon the ground that the facts stated in the first count thereof do not constitute a crime, and in support of his argument he urges that the allegations therein do not contain false representations as to past or existing facts.

It is well established that the false pretense or representation must relate to a past or present fact, and not be the basis of an opinion, promise or profession of purpose. See *People* v. *Hart*, 35 Misc. Rep. 182, where Mr. Justice Goff discusses this question with great ability and learning, in an opinion containing an exhaustive collection of authorities on the subject.

Tested by this rule, it must be conceded that the allegations of the second and third subdivisions do not constitute false pretenses and representations as

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understood in the criminal law, for the reason that they do not relate to past or existing facts. It is clear that the statements therein contained constitute an expression of opinion by the defendant, and a promise or intention on his part to obtain the exemption of the complaining witness from military service in the Italian army. *People* v. *Majorana,* 155 App. Div. 432; *Ranney* v. *People,* 22 N. Y. 413; *People* v. *Blanchard,* 90 id. 314; *People* v. *Baker,* 96 id. 340; *People* v. *Peckens,* 153 id. 576.

But the indictment is sufficient because the false pretenses or representations charged in the first subdivision constitute positive statements as to existing facts which were of a material character, and undoubtedly must have influenced the complaining witness to part with his money. *People* v. *Peckens, supra.*

In *People* v. *Miller,* 169 N. Y. 339, 351, the court said: "False pretenses * * * as a means of obtaining the title or possession of money or personal property, imports an intentional false statement concerning a material matter of fact upon which the complainant relied in parting with the property or in delivering the possession."

One false representation of a material character is sufficient to uphold the validity of an indictment; and the materiality and influence of such representation is a question for the jury, unless upon the face of the indictment the representation appears clearly to be immaterial. *Thomas* v. *People,* 34 N. Y. 351; *Webster* v. *People,* 92 id. 422; *People* v. *Peckens, supra.*

In *Thomas* v. *People, supra,* the defendant was charged with the crime of larceny by means of false pretenses, in that he falsely represented: (1) that he was a chaplain in the army, just returned from the army; (2) that he wanted money to go home with; and

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(3) that he would give complainant an order for the repayment of any money that the complainant might loan him.

The court, through Smith, J., said: "The representation charged to have been made by Thomas, that he would give Ludington an order for the repayment of any money he might loan him, obviously is not a false pretense, within the meaning of the statute, for it is a mere promise. His statement that he wanted money to get home with, is not averred to have been untrue in fact. But the false representations made by him, to the effect that he was a chaplain in the army, and that he was a friend of Wise & Co., of Lafayette, were of such a nature, that it is impossible to assert that Ludington was not deceived by them in respect to Thomas' ability to pay.

"In *Regina* v. *Hamilton* (1 Cox Cr. C. 244, s. c. on appeal, 9 Ad. & El. [N. S.] 376), the pretense consisted of a false statement by the defendant, that he was a captain in her majesty's fifth regiment of dragoon guards. Lord Denman, Ch. J., with the concurrence of all the judges, said: 'We can easily conceive how a belief that the defendant was a captain in the army, might lead the other party to give the security; but it is a matter to be shown by the evidence.'"

The facts of the case of *People* v. *Majorana, supra,* relied upon by the defendant to sustain his contention are clearly distinguishable from those of the present case.

In the *Majorana* case, as stated by the court: "The complainant, wishing relief from service in the Italian army, relied upon the defendant's statement that he could and would obtain it, and for his proposed service paid him the money. * * * There was no false representation, as the defendant assumed to state no fact,

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present or past (*People* v. *Miller*, 169 N. Y. 339). The assurance that he would perform the service was a promise, and that he could do it was a matter of opinion."

In the case at bar, as has already been pointed out, the defendant made explicit statements concerning existing facts, namely, that he was connected with and authorized to act for the Italian consul in the city of New York. These allegations were wholly lacking in the *Majorana* case, and in this particular is to be found the point of differentiation between the two cases.

Governed by the principle enunciated in the *Thomas Case, supra,* I am of the opinion that the indictment is sufficient. The demurrer is, therefore, disallowed.

Demurrer disallowed.

THE WATERBURY-WALLACE COMPANY, INC., Appellant, *v.* JAMES R. G. IVEY, Respondent.

(Supreme Court, Appellate Term, First Department, March, 1917.)

Negotiable instruments — bills, notes and checks — when negotiable — meaning of words "value received with interest" and "as per contract" — pleading.

Although the words "value received with interest" in a promissory note are followed by the words "as per contract" of a certain date, the instrument is negotiable.

APPEAL by plaintiff from an interlocutory judgment of the City Court of the city of New York sustaining defendant's demurrer to the complaint.

Hugh M. Hewson, for appellant.

Dowsey & Parsons (Erastus J. Parsons, of counsel), for respondent.

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MULLAN, J. The complaint is upon a promissory note reading as follows:

"$1,600.00. *November* 13, 1915.

"Ninety-two (92) days after date I promise to pay to the order of Wallace Novelty Co., Inc., Sixteen Hundred ..... Dollars, at 66 Broadway, N. Y. City. Value received with interest as per contract of Nov. 12th, 1915.

"J. R. GRAVES IVEY."

(The payee is the plaintiff, its corporate name having been changed after the note was made.)

Also set out is the contract to which the reference upon the note is made. The defendant's demurrer for insufficiency is predicated upon the theory that the reference to the contract must be construed as a promise to pay in accordance with the terms of that contract, and that the latter is accordingly made part of the note by virtue of the reference to it, and, being such, shows that the note was to be paid out of a particular fund, and that only. From the view we take of the case, it will not be necessary to examine the contract for the purpose of determining whether or not it restricts payment of the note to a stated fund, as, if the mention of the contract be held not to constitute more than a reference to the transaction out of which the note grew, the quality of negotiability is present, and the complaint must be held sufficient. Although the action is by the payee and against the maker, the note not having passed out of the payee's hands, the question of negotiability is important for the reason that the only allegation in the complaint as to consideration, namely, that the note was for value received, would not support an action upon a non-negotiable instrument. *Neukirch* v. *McHugh*, 165 App. Div. 406, and cases there cited.

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In determining whether the reference to the contract destroyed the negotiability of the note, we are compelled to confine our examination to the note itself. *Schmittler* v. *Simon,* 101 N. Y. 554, 559; *National Bank of Newbury* v. *Wentworth,* 218 Mass. 30. It was said in the *Schmittler* case (see p. 560) that: "The mere mention of a fund in a draft, does not necessarily deprive it of the character of commercial paper, but it must further appear in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise. The question, therefore, to be determined here is, whether the fund in question is referred to as the measure of liability or the means of reimbursement." The rule would seem, therefore, to go much further in supporting negotiability than it is necessary to go in the present case, as there is no reference to a fund or other means of payment.

The tendency of the courts is to construe commercial instruments having on them a memorandum or reference to dealings between the parties, as negotiable, if they in other respects have all the characteristics of negotiability. *Schmittler* v. *Simon, supra,* 561; *Hibbs* v. *Brown,* 190 N. Y. 167. There are many cases in the books where it has been held that additional writings upon a note or bill have destroyed negotiability, but it will be found upon examination that the ruling invariably rested upon a determination that the language there present showed that the maker or drawer clearly intended to charge a specified fund and not to go beyond that. The closest cases we have found are *National Bank of Newbury* v. *Wentworth, supra,* and *Taylor* v. *Curry,* 109 Mass. 36. In the *National Bank of Newbury* case the words "as per terms of contract" followed the words "value received" at the end of the note. In the *Taylor* case the note was given by an assured in payment of

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a premium, and bore upon it the words "on policy No. 33,386." In both cases it was held that the words claimed to have the effect of destroying negotiability were mere references to the transactions out of which the notes grew, and that the instruments were negotiable. In the *Taylor* case the court said (at p. 37): "The words quoted in these notes do not express any contingency as to the payment of the notes, or refer to any fund out of which they are to be paid, but appear to refer to the consideration for which they were given. Such a reference may be for mere convenience, or for any other reason; but it cannot be interpreted as a modification of the promise. Even if the policy contains a provision for a set-off in case of loss, this does not make the payment of the note contingent upon the happening of no loss; for the language referred to does not express any such contingency." In *National Bank of Newbury* v. *Wentworth* the court said (at p. 32): "But, while the defendant (maker) doubtless intended to guard against the payment of money for which in the future he did not receive an equivalent, and the payee has gone into bankruptcy, the language used does not affect the payment of the amounts shown by the notes." In both of these Massachusetts cases the court points out that the ruling would have been different had the questioned language been such as "subject to" the contract, or the policy, as the case might be, citing cases where reference in such form was held to create restriction of payment. The respondent relies upon *Ehrichs* v. *De Mill*, 75 N. Y. 370, where the note read: "Please pay to F. Ehrichs $400.00 and charge the same to my account of grading and paving Lexington Avenue, between Patchen and Broadway, as per contract." It will be seen that the instrument there construed clearly

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restricted payment to the fund created by the contract mentioned. We think the note in question in the present case was negotiable, and that the complaint is good.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to the defendant to withdraw demurrer and answer within six days after service of a copy of the order entered hereon in the City Court and notice of entry thereof and payment of costs in this court and in the court below.

GUY and PHILBIN, JJ., concur.

Interlocutory judgment reversed, with costs.

UPLAND REALTY COMPANY, Appellant, *v.* THE CITY OF NEW YORK, Respondent.

(Supreme Court, Appellate Term, First Department, March, 1917.)

Title — when vested in city of New York — taxes — condemnation proceedings — pleading — actions — judgments — Greater New York Charter, §§ 914, 990.

On April 3, 1913, pending proceedings, as authorized by section 990 of the Greater New York Charter, to acquire title by condemnation to certain premises, including those of plaintiff, for street purposes the board of estimate and apportionment adopted a resolution declaring that upon May 1, 1913, the title in fee to each and every piece or parcel of land lying within the lines of a certain street should be vested in the city. Pursuant to section 914 of said charter, as amended in 1911, the taxes for the first half of 1913 became due and payable May 1, 1913, and a lien upon real estate subject to taxation. Plaintiff upon receiving payment of an award in the condemnation proceedings, at the request of the city

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comptroller, paid to the city the tax for the first half of the year 1913, with interest, upon its land taken in said condemnation proceedings, under a stipulation between plaintiff and the city to the effect that the taxes so paid were paid under protest and without prejudice to plaintiff's right to recover the amount thereof, and interest, or without operating as a waiver of plaintiff's right to enforce payment of the award, without paying the tax. In an action to recover the amount of taxes so paid, *held*, that the tax was not due and payable before May 1, 1913, and for that reason there could be no counterclaim or set off in favor of the city against the award due plaintiff.

That there could be no question that plaintiff's title to the land in question ceased to exist April 30, 1913, and presumably the award granted to it was made on that basis.

That the lien, charge or claim for the said taxes for the first half of the year 1913 against said property must be regarded as affecting only the city which became its owner on May 1, 1913.

That neither upon the theory that the tax became a charge on March 28, 1913, when the assessment rolls were finally completed and delivered to the receiver of taxes, with direction for collection of all taxes set forth therein, plaintiff being then the owner of the property, nor upon the theory that plaintiff was such owner on May 1, 1913, was defendant entitled to deduct the tax from the award due to plaintiff.

That the judgment in favor of defendant dismissing the complaint on the pleadings should be reversed, with costs, and judgment directed in favor of plaintiff for the amount claimed, with interest and costs, together with costs in the court below.

APPEAL from judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, in favor of the defendant, dismissing the complaint on the pleadings.

Philip B. La Roche, Jr., for appellant.

Lamar Hardy, Corporation Counsel (William H. King and David Robson, of counsel), for respondent.

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PHILBIN, J. The plaintiff set forth the following facts: Prior to the 1st of May, 1913, the appellant was the owner of certain premises situated in the borough of The Bronx, city of New York, and designated on the tax maps as block 2872, lot 100. Before that date, and on the 14th of December, 1911, the city instituted proceedings to acquire title by condemnation, for street purposes, to that portion of the premises lying within the lines of West One Hundred and Seventy-second street, as laid out as a proposed street on the map. Pending these proceedings, as authorized by section 990 of the Greater New York Charter, the board of estimate and apportionment on the 3d of April, 1913, adopted a resolution declaring "that upon the first day of May, 1913, the title in fee to each and every piece or parcel of land lying within the lines of West 172nd Street * * * shall be vested in the City of New York." Upon said 1st day of May, 1913, the taxes for the first half of that year became due and payable, and a lien upon real estate subject to taxation, pursuant to the provisions of section 914 of the Greater New York Charter, as amended by Laws of 1911, chapter 455. This section provides that the receiver of taxes, upon receipt of the assessment rolls, shall give public notice by publication "that such assessment rolls have been delivered to him and that all taxes shall be due and payable at his office in the said respective borough as follows: All taxes upon personal property and one-half of all taxes upon real estate shall be due and payable on the first day of May, and the remaining and final one-half of the taxes on real estate shall be due and payable on the first day of November. All taxes shall be and become liens on the real estate affected thereby on the respective days when they become due and payable, as hereinbefore provided, and shall remain such liens until paid." The

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remainder of the section allows for payment in advance on the first day of May of the second half year's tax which becomes due and payable and a lien on November first, with a rebate for such prepayment at the rate of four per cent per annum. It is further alleged that pursuant to the resolution of the board of estimate and apportionment and the statutes in such cases made and provided the city on the 1st of May, 1913, become seized in fee of all the estates, rights, titles and interests in said portion of West One Hundred and Seventy-second street, including the said estate of plaintiff, and has so continued, and plaintiff has had no interest or estate therein since the 30th day of April, 1913. On or about the 11th day of October, 1915, an award having been duly made and confirmed to plaintiff by the commissioners of estimate for its land in the bed of West One Hundred and Seventy-second street, the plaintiff received payment thereof from defendant. At the request of the comptroller of the city, the plaintiff at the same time paid to defendant the tax for the first half of the year 1913, together with interest thereon upon said land, the amount so paid being the sum of ninety-six dollars and forty-five cents. Such payment was made pursuant to a stipulation between plaintiff and defendant. The stipulation provided, in effect, that the taxes so paid were paid under protest and without prejudice to plaintiff's right to recover the amount thereof and interest, or without operating as a waiver of its right to enforce payment of the award without paying the tax. The complaint further states that the tax for the first half of the year 1913 did not become a lien upon the said premises until the 1st of May, 1913, at which time defendant was or had become vested with the title thereto, and after plaintiff had ceased to be the owner

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thereof, or of any estate therein. The usual allegation of service of notice of claim upon the city follows, and the plaintiff demands judgment for ninety-six dollars and forty-five cents with interest.

The further facts which are set forth in the answer show that in the assessment rolls for the year 1913 there was included the tax for the said lot 100 and that on the 28th of March, 1913, the board of aldermen of the city of New York caused the assessment rolls of the borough of The Bronx, as finally completed, to be delivered to the receiver of taxes, and directed the collection of all taxes set forth in the rolls. No part of the tax was paid on the 1st of May, 1913, or immediately thereafter, and on or about the 31st of May, 1913, the tax commissioners subdivided said lot in three separate parts so as to separate those portions of the lot remaining in the ownership of the appellant from that which had been acquired by the city, and upon such subdivision the entire tax upon the lot was apportioned among the three subdivisions thus made. After the apportionment of the two parcels remaining to the appellant had been determined, there remained the sum of eighty-two dollars and thirty-five cents, which was carried on the rolls as charged to the premises taken for street purposes.

Upon these facts the appellant claims that it not being the owner of the lot on the first day of May, when the tax became payable and a lien thereon, it was not under a duty to pay the tax and is now entitled to recover the amount deposited under the stipulation. In support of this contention, it urges that on the 1st day of May, 1913, when it is claimed by the defendant that the tax became a lien, the city became seized in fee, pursuant to the resolution of the board of estimate and apportionment, and that prior to that time the

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tax did not become due and payable, or a lien upon the lot. It is also pointed out that it never did become a lien upon the premises acquired for street purposes, for the reason that all lands held by the city in trust for street purposes are exempt from taxation. Tax Law, § 4, subd. 3.

The answer substantially admits all the allegations of fact in the complaint, except in so far as it is alleged that the plaintiff was not the owner of the property on the 1st day of May, 1913, and that the tax did not become a lien thereon until the title thereto had become vested in the defendant, and alleges that the tax was a debt due from the appellant to the respondent since the 28th of March, 1913. The defendant sets up two grounds for its contention that the tax became a charge or lien on the property when owned by the plaintiff. It first asserts that the full amount of the taxes for the year 1913 upon the lot in question became a charge prior to the 1st of May, 1913, and hence was properly payable by plaintiff, and no recovery, therefore, can be had. In other words, that, while the tax did not become a lien until that date, it did become on the 28th of March, 1913, a fixed charge upon the property for not only the half payable on the 1st of May, but also for the entire tax, the other half of which was payable in the following November. As this argument is based upon an assumption, solely for the purpose thereof, that plaintiff was not the owner on the 1st day of May, 1913, the reasoning logically would be equally applicable to the second half which became due in November following, or about six months after plaintiff had had its title divested by the city. In brief, instead of deducting merely the first half of the tax for 1913, the comptroller should have deducted the entire tax for the year. Viewed in that

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light, the claim must appear to be wholly untenable. In the case of *Doonan* v. *Killilea*, 87 Misc. Rep. 427, cited by defendant, the action was upon a breach of a covenant in a deed that the property was free and clear from all charges, assessments and incumbrances. Prior to the conveyance an assessment had been confirmed. The defendant demurred on the ground that the assessment under the statute did not, in fact, become a lien until six days after the delivery of the deed. The court overruled the demurrer, holding that the confirmation of the assessment was a charge within the *meaning of the covenant against incumbrances*, although there was no lien when the deed was delivered, since ten days had not elapsed after the entry of confirmation in the collector of assessments' books. In so deciding, reliance was placed on *Lathers* v. *Keogh*, 109 N. Y. 583, and *De Peyster* v. *Murphy*, 66 id. 622. While both of these cases, like the *Doonan* case, dealt with the obligations arising upon covenants between vendor and vendee and, therefore, may not be regarded as being wholly applicable to the facts here, yet even if that distinction were not sufficient, they fail to support the defendant's argument. In the *De Peyster* case the covenant in the deed stated that the premises were free and clear of all "*charges*, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever." An assessment had been confirmed at the time the title passed, but had not then been entered in the book of assessments and was not a lien. It was held that the assessment, while not a lien, was fairly embraced within the terms of the covenant. The contract of sale in *Lathers* v. *Keogh*, *supra*, provided that title was to be closed as of the 1st of September, 1883, in relation to rents, issues and profits, and "calculations and adjustments

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of the exact amounts to be paid as to rents, interest, etc.," (sic), were to be made as of that date. Title was closed on the twenty-third of August, and on the twenty-ninth of August the tax on the premises was confirmed. Upon the claim by the vendee that there had been a breach of the covenant, the court interpreted the latter and found it was not the intention of the parties to include the tax in the adjustment to be made as of the first of September, pursuant to the stipulation in the contract. The court found that the tax not having been confirmed on the day of closing, it was not an incumbrance or a charge within the meaning of the covenant and that the stipulation providing for an adjustment as of a date which occurred after the tax was confirmed did not by its terms include the tax. Like *De Peyster* v. *Murphy, supra,* it ascertained the respective rights of the vendor and vendee under the covenant in the deed. Here, there is no covenant to be construed, but the question presented is as to whether the tax was made a lien or charge by law prior to the 1st of May, 1913. In the *Doonan Case, supra,* the assessment was not made " due and payable " on a day specified by the statute, but upon confirmation. In *Lathers* v. *Keogh, supra,* the court said, referring to the confirmation of the tax and transmission to the receiver of taxes for collection: " Until these requirements of the law have been fulfilled the tax is not due or payable, and no lien attaches to the property nor can any legal charge for any tax be said to rest upon it." Although the conclusion reached by the court as to the meaning of the covenant was the basis of its decision, and, as it was not called upon to decide the question here presented, its remarks may not seem to literally apply, yet by a parity of reasoning they may be regarded as opposed to defendant's claim. It held

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that no legal charge for any tax could rest upon the real estate until by confirmation it had become *due and payable.* The court was referring to the law as it existed in the year 1883. The present statute expressly provides that "one-half of all taxes on real estate shall be due and payable on the first day of May." Laws of 1911, chap. 455; Charter, *supra.* Under the law as it stood at the time in question here, the confirmation of the tax rolls was simply an ascertainment or determination as to the amounts that would be due and payable on the first of May, and a charge was not created thereby. It follows that the tax was not due and payable before the 1st of May, 1913, and there could not for that reason be any counterclaim or set-off on behalf of the city against the award due the plaintiff.

The second ground upon which defendant relies is that, when the taxes became due and payable and a lien on the first of May, plaintiff was still the owner of the property. It is unnecessary to cite any authority for the familiar rule that fractions of a day are not recognized by law. The defendant asserts that the burden being upon the plaintiff, it was bound to establish that the title vested in the city on the first of May before the tax had become a lien. Except in so far as such a conclusion might be based upon the theory of the burden of proof, there is no sufficient reason given why it should be accepted. The issue to be decided here as to the time of the happening of the two events is not to be determined upon proof of disputed facts, but rests upon the deduction to be drawn from conceded facts. The statute said that the lien should attach on the first of May and the resolution of the board of estimate and apportionment declared that title should vest upon that day. There can be

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no question that plaintiff's title to the lot ceased to exist with the 30th of April, 1913, and presumably the award of compensation granted to it on behalf of the defendant was made on that basis. The change in the status of the parties was not procured through any physical act which occurred on the first of May, but became fixed without any overt intervention by reason of the action taken by the legislature and the board of estimate and apportionment long prior to that time. It would, therefore, appear that the lien, charge or claim for said taxes against the property must be regarded as affecting only the city, which had become its owner on the 1st of May, 1913. We think that neither upon the theory that the tax became a charge on March 28, 1913, while the plaintiff was the owner of the property, nor upon the theory that plaintiff was such owner on the 1st of May, 1913, was the defendant city entitled to deduct the tax on the lot from the award due the plaintiff.

Judgment reversed, with thirty dollars costs to appellant, and judgment directed in favor of the plaintiff for ninety-six dollars and forty-five cents, with interest thereon from the 11th day of October, 1915, together with appropriate costs in the court below.

GUY and MULLAN, JJ., concur.

Judgment reversed, with costs to appellants.

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CASSIDY'S, LIMITED, Respondent, v. JOSEPH ROWAN and TERESA ROWAN, Appellants.

(Supreme Court, Appellate Term, First Department, March, 1917.)

Lease — to foreign corporation — landlord and tenant — what constitutes "doing business in this state" — evidence.

The subletting to different tenants, of a building in the city of New York leased to a foreign corporation under a lease delivered in this state, constitutes "doing business in this state."

APPEAL by defendants from a judgment of the City Court of the city of New York, entered upon a verdict of a jury directed by the court.

James F. Nugent, for appellants.

John Hovorka (Walter L. Bunnell, for counsel), for respondent.

BIJUR, J. This action is brought by a foreign corporation to recover for the rent of certain premises for three months of 1916. Although there is some discussion in the brief on the question of constructive eviction, it does not appear that such defense was adequately established. On the other hand defendants pleaded and proved that plaintiff was a foreign corporation engaged in business in this state, and that the contract, namely, the lease, upon which this action was brought, was made in this state, and that plaintiff had not obtained a certificate authorizing it to do business, as required by section 15 of the General Corporation Law. The plaintiff makes two answers to this conten-

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tion, neither of which is sound: *First,* that the lease was not made in this state, which claim is apparently based on the fact that although the defendants signed the lease here the plaintiff signed it in Canada. It was, however, delivered in this state, and must therefore be regarded as a contract made here. *Witthaus* v. *Starin,* 12 Daly, 226.

Plaintiff's second point is that it was not doing business in this state, on the authority of *Singer Manufacturing Co.* v. *Granite Spring Water Co.,* 66 Misc. Rep. 595; also *Singer Sewing Machine Co.* v. *Foster,* 75 id. 641, and *People ex rel. Singer Manufacturing Co.* v. *Wemple,* 150 N. Y. 46. But it is quite apparent from a reading of these cases that they turn on the point that unless a foreign corporation is organized for the purpose of holding or operating real estate, the *mere investment of surplus funds* in this state does not constitute "doing business in this state." The plaintiff does not come within the letter or spirit of this reasoning, because it did not even own the premises rented, but was merely lessee thereof. There is a statement in the record by plaintiff's counsel as follows: "Cassidy's Limited rented that whole building, and they have been subletting it to different tenants, if that constitutes doing business there, but I claim they do not. * * * That lease was thrown at them, as I understand it; they could not help it on account of the failure of the Bawo & Dotter Company." Of course a statement of this kind cannot take the place of testimony unless accepted as such, and there is nothing to indicate that it was either so understood or accepted by the court or by defendants' counsel; but in any event it does not alter the fact that the plaintiff was lessee of a building in this city and engaged in subletting it for profit. I know of no

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authority, nor am I cited to any, for holding that it was not, under those circumstances, engaged in doing business in this state.

HENDRICK and WEEKS, JJ., concur.

Judgment reversed and new trial granted, with costs to the appellants to abide the event.

MAURICE WAGMAN, Appellant, *v.* HARRY BAKST, Trading as IDEAL CLOAK AND SUIT COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, March, 1917.)

Tender — when should be made — action for work, labor and services — pleading — judgments — Code Civ. Pro. §§ 731, 732, 734 — Municipal Court Code, § 15.

Though by section 15 of the Municipal Court Code sections 731, 732 and 734 of the Code of Civil Procedure are made applicable to the Municipal Court of the city of New York, they only apply to a tender made after suit brought and before trial.

Where in an action brought in the Municipal Court of the city of New York to recover for work, labor and services defendant pleads an agreement by plaintiff to perform the work and furnish the materials for a certain sum and claims in his answer that he tendered that amount to plaintiff before the commencement of the action and that before the trial he had deposited the same into court, but no attempt was made to prove the tender and it was not claimed that the deposit covered any costs, a finding by the trial court that the amount of said deposit was owing to plaintiff and that judgment should be for defendant was erroneous, and a judgment entered by inadvertence in favor of defendant for the amount of the deposit and costs will be reversed and judgment directed in favor of plaintiff for a like amount, and costs in the court below.

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APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, rendered in favor of the defendant.

Foulds & Galland (Andrew Foulds, Jr., of counsel), for appellant.

Goldstein & Goldstein (David Goldstein and E. J. Bisgyer, of counsel), for respondent.

Per Curiam. This action was brought to recover for work, labor and services performed and for materials furnished. Defendant set up, among other defenses, that the plaintiff had agreed to perform the work and furnish the materials for the sum of eight dollars and upon this issue the court below found in favor of the defendant. The defendant claimed in his answer that he tendered this amount to the plaintiff before the commencement of the action and that before the trial he had deposited that amount into court. The court below found, as stated in a memorandum filed by the trial justice, that "the defendant * * * actually offered and tendered to the plaintiff the sum of eight dollars before the *commencement of the action;* that the defendant in aid of his plea of tender was privileged to *make deposit* of the amount with the clerk at *anytime before trial* and the court having found as a matter of fact that the eight dollars was owing the plaintiff, judgment should be for the defendant."

As the record stands this finding was error. We know of no statutory provision regarding a tender before suit brought. Under the common law a tender made before suit was required to be kept good and followed by payment into court after suit was brought, and the party making the tender was required to show

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that he had always kept the amount tendered ready to pay over when demanded, and to bring the same money into court. *Roosevelt* v. *Bulls Head Bank*, 45 Barb. 579–584. Section 81 of the Municipal Court Code has reference to a written offer of judgment to be made after suit and before answering and such offer must include costs. If, in lieu of a written offer, the defendant desires to deposit the money into court it must be the same amount as "his offer," which of course must also include costs. These costs would be, at least, the clerk's fees for filing the summons, proof of service and trial fee (Mun. Ct. Code, § 173) and the fee for service of the summons if any. Mun. Ct. Code, § 178.

When an offer of judgment is thus made or if a sum of money equal thereto is deposited, unless the plaintiff recovers a more favorable judgment, neither party can recover costs. Mun. Ct. Code, § 81; Lauer's Mun. Ct. Pr. 403.

By the provisions of section 15 of the Municipal Court Code, sections 731, 732 and 734 are applicable to the Municipal Court, but those sections only apply to a tender made after suit is brought and before trial. Such a tender can only be made when the complaint demands judgment for a sum of money only, and the action is brought to recover a sum certain or which may be reduced to a certainty by calculation or to recover for a casual or involuntary personal injury or a like injury to property. It must be made before trial and include costs of the action "to that time." § 731. Such tender to be effectual, unless accepted, must be paid into court, before trial, and a notice in writing served upon plaintiff's attorney before trial, and within ten days after the tender. § 732. If it appears upon the trial that the sum tendered was sufficient to pay the plaintiff's demand and also to pay

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the costs of the action up to the time of the tender, the plaintiff cannot recover costs but must pay the defendant's costs from that time. Code Civ. Pro. § 733. Section 734 of the Code of Civil Procedure provides when the tender must be deducted from the recovery, etc. It would seem that the provisions of section 733 of the Code of Civil Procedure must be regarded as having been modified by section 81 of the Municipal Court Code so that upon a deposit of a sum equal to and in lieu of the defendant's written offer of judgment being made the costs recoverable would be governed by the latter section and not by section 733, Code of Civil Procedure. In the present case the defendant pleaded a tender made before suit, but no attempt was made to prove it and there is no claim made that the deposit of eight dollars covered any costs. By an evident inadvertence the clerk entered judgment in favor of the defendant for the sum of eight dollars and costs. The judgment should have been in favor of the plaintiff for that sum and costs, thus enabling the plaintiff to recover at least his disbursements, the amount of the payment into court to be credited upon the judgment. *Rumpf* v. *Schiff*, 109 N. Y. Supp. 51.

Judgment reversed and judgment directed in favor of the plaintiff for the sum of eight dollars and costs in the court below and without costs to either party upon this appeal.

Present: GUY, PHILBIN and MULLAN, JJ.

Judgment reversed.

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BRUCE R. DUNCAN, as General Guardian of the Property of FLORENCE A. LARSON and ELFRIDA A. LARSON, Infants, and J. FRANK BELFORD, Respondents, *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

(Supreme Court, Appellate Term, Second Department, March, 1917.)

Guardians — letters of — power of general guardian — insurance (life) — infants — appeal — Code Civ. Pro. § 2650.

Where letters of guardianship granted after September 1, 1914, when section 2650 of the Code of Civil Procedure took effect, recite that the general guardian shall act jointly with a named person in the collection and receipt of moneys and property of the infants, payment of the amount due them on a policy of life insurance, by a check drawn to the order of the general guardian individually and as general guardian without including the name of the person designated in the letters of guardianship to serve jointly with the general guardian, who was the father of the infants, is no defense to an action to recover on the policy.

BENEDICT, J., dissents.

APPEAL from a judgment in an action to recover on a policy of life insurance.

Murray Downs, for appellant.

Bruce R. Duncan, for respondent.

CALLAGHAN, J. The sole question involved here is the construction and effect of section 2650 of the Code of Civil Procedure. It was changed by chapter 520 of the Laws of 1914, amending the Surrogate's Court Act (Laws of 1914, chap. 443), which went into effect

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September 1, 1914. So much of that section as is pertinent to this inquiry is as follows: "Where the property of the infant does not exceed the sum or value of $2,000, as shown by the petition, the surrogate may, in his discretion, make an order dispensing with such bond wholly or partly, and directing that the guardian collect and receive the moneys and property of his ward jointly with a person designated in the order, and that all such moneys and other property, so far as the same are conveniently capable of deposit, shall be deposited in the name of such guardian, subject to the order of the surrogate, with such bank, savings bank, trust company, or safe deposit company as shall be designated in such order, and shall be withdrawn or removed only on the order of the surrogate. The letters issued thereupon shall contain the substance of the order."

It appears that the defendant was indebted to the infants Florence A. Larson and Elfrida A. Larson on a policy of life insurance, in the sum of fifty dollars. On the 22d day of September, 1914, one Axel Larson was duly appointed general guardian, jointly with J. Frank Belford, of the infants. The letters of guardianship recited that the said Axel Larson was appointed: "General guardian of the persons and property of the said infants and that the general guardian jointly with J. Frank Belford collect and receive the moneys and property of the said infants and that all such moneys and properties so far as same are conveniently capable of deposit, be deposited in the name of said general guardian, subject to the order of the surrogate, with certain depositaries therein mentioned."

The insurance company made payment of the sum of fifty dollars by a check drawn to the order of Axel Larson individually and as general guardian, without including the name of J. Frank Belford, the person

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designated in the order to serve jointly with said Larson. An inspection of the letters of guardianship would have disclosed the limitation placed upon the guardian by the surrogate, which was that he was to act jointly with another party. If the defendant paid the amount involved here without having ascertained the authority of Larson to receive the money or without closely inspecting the letters of guardianship, it then is entitled to no consideration because of the omission to make proper inquiry as to who was entitled to receive the money of these infants.

It is difficult to determine upon what theory the defendant seeks to prevent a recovery in this action. No contention is made that the statute is invalid or that the surrogate in naming the guardian with the limitation expressed in the letters exceeded his authority, and it is conceded that the letters contained a proper reference to the provisions of the statute.

The question as to the power of general guardians over the property of their wards is not involved in this controversy. The legislature undoubtedly has the right to prescribe forms of guardianship. We are not concerned on this appeal with the question as to whether or not the legislature acted wisely in enacting this statute. It is sufficient for us to say that it had the power to make the law and the courts are bound to follow it.

Judgment affirmed, with twenty-five dollars costs to the respondent.

CLARK, J., concurs.

BENEDICT, J. (dissenting). This action was brought to recover fifty dollars, being the amount of the surrender value of a life insurance policy. The answer,

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besides containing denials, contained a plea of payment and a denial of any interest in the policy on the part of the plaintiff Belford.

This action involves the construction of section 2650 of the Code of Civil Procedure as it was changed by chapter 520, Laws of 1914, amending the Surrogates' Court Act (Laws of 1914, chap. 443), which went into effect September 1, 1914. The former provision regarding the qualification of guardians of property of an infant, as contained in section 2830 of the Code, was amended by certain changes in the former section, which do not affect the question at issue here, and by the addition of the words: "But in counties containing a city of the first or second class, or a part of such city, where the property of the infant does not exceed the sum of two thousand dollars, the surrogate, before the issue of letters of guardianship of the infant's property, shall make an order directing that the guardian collect and receive the moneys and property of his ward jointly with a person designated in the order, and that all such moneys and other property, so far as the same are conveniently capable of deposit, shall be deposited in the name of such guardian, subject to the order of the surrogate, with such savings bank or safe deposit company as shall be in like manner designated. Such letters shall contain the substance of the order. The cost of deposit with a safe deposit company shall be a county charge and the money or property so deposited shall be withdrawn or removed only on the order of the surrogate."

It was stipulated by the parties that on November 17, 1910, the defendant issued a policy of insurance in the sum of $500 on the life of Axel Larson, and by that policy it agreed to pay the sum of $500 to his daughters Florence A. and Elfrida A. Larson, share and share alike, or to the survivor of them, as beneficiaries with-

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out the right of revocation. It was also stipulated that the premiums upon the policy were payable quarterly, and that they were in fact paid up to the 17th day of November, 1914. It was also stipulated that on September 22, 1914, the surrogate of Kings county issued letters of guardianship appointing Axel Larson general guardian of the persons and property of Florence A. Larson and Elfrida A. Larson, who are the same persons described in the complaint in this action. It was also stipulated that by decree of the Surrogate's Court, dated September 22, 1914, it was provided that, "the general guardian, jointly with J. Frank Belford collect and receive the moneys and property of the said infants and that all such moneys and property so far as the same are conveniently capable of deposit shall be deposited in the name of the said general guardian, subject to the order of the Surrogate * * * that we do by these presents constitute and appoint you, the said Axel Larson, general guardian of the persons and property of the said infants during their minority or until another guardian shall be appointed but only according to the limitations contained in said decree."

It was also stipulated that Axel Larson duly qualified as such general guardian and entered upon the performance of his duties as such. It was also stipulated that the policy of insurance on the 24th day of September, 1914, had a cash surrender value of fifty-six dollars and thirty-three cents. It was also stipulated that on September 24, 1914, Axel Larson individually and Axel Larson, as general guardian of the said infants, demanded from the defendant company the said cash surrender value of the policy. It was also stipulated that the defendant on October 2, 1914, made its check payable to the order of Axel Larson

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and Axel Larson, as guardian of Florence A. Larson and Frida A. Larson, also known as Elfrida A. Larson, for the sum of fifty-six dollars and thirty-three cents in full of the value of said policy; and also that the said check was indorsed by Axel Larson individually and also by Axel Larson, as guardian of said infants, and the proceeds of said check were collected by him.

It was also stipulated as follows: "It is admitted that the issue in this case is whether or not under the decree of the Surrogate of Kings County above referred to and the Letters of Guardianship above referred to the defendant company have the right to make a payment of the cash surrender value under the policy of insurance to Axel Larson without making the check or the payment jointly to J. Frank Belford mentioned in the said Order, Decree and Letters of Guardianship and that if the defendant did have the right under that Decree and Letters of Guardianship why then the plaintiff can not recover but if the defendant did not have the right, then the plaintiff should recover."

By the allegations of the complaint and the admissions of the answer it further appears that by order of the Surrogate's Court of Kings county, dated February 23, 1915, Axel Larson was removed as general guardian of the property of Florence A. Larson and Elfrida A. Larson; and that by another order of said court, dated April 21, 1915, Bruce R. Duncan, one of the plaintiffs herein, was appointed general guardian of the property of the said infants, and ever since said date has been and now is acting as such general guardian. It also appears that by the terms of said order, dated April 21, 1915, "said Bruce R. Duncan jointly with J. Frank Belford were (*sic*) duly authorized and empowered to collect and receive the

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moneys and property of said infants and deposit all such moneys subject to the order of the Surrogate's Court as directed in said order," and also that the plaintiffs have duly demanded of the defendant the aforesaid sum of fifty dollars belonging to said infants, which demand has been refused.

Upon the foregoing statements taken from the fragmentary, inexact and ungrammatical allegations and stipulations of the parties the trial court has found in favor of the plaintiffs, but in its conclusion I find myself unable to concur. Without entering upon an examination of the power of general guardians over the property of their wards, a subject which has been ably and elaborately considered by Mr. Surrogate Fowler in the opinions which he has written in reference to the changes in the Surrogate's Court Law made by the amendments of 1914, it will, I think, suffice to say that the statute was not intended — if the legislature can be presumed to have had any intention of its own in passing it — to be used as a trap for persons who, in good faith, discharge their contractual obligations towards minors by the payment of moneys or the delivery of property to the person or persons appointed as the general guardian or guardians of the property of such infants.

I shall not attempt to discuss, as Surrogate Fowler did in *Matter of Hirshfeld*, 88 Misc. Rep. 399, and in a later decision (*Matter of Kaufman*, 93 id. 408), the unfortunate results which were made possible and probable by the enactment of this statute, by reason of the fact that guardians appointed without bond have been recreant to their trust. It will be sufficient, I think, to indicate that the amendment in question attempts to set up a new and hybrid form of guardianship, whereby the ancient office of guardian of the

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property of an infant, conferred upon a person under suitable bond, is done away and a creature of statute, two-fold in form, is called into being to take the place. This novel combination possesses, when looked at from one standpoint, the powers and functions of the former office, but only in a rudimentary or crippled state, and when looked at from another aspect it possesses no powers whatsoever.

I took occasion to say in another case (*Haug* v. *Hewitt*, 87 Misc. Rep. 67), in commenting upon this statute shortly after its enactment, that the Supreme Court should not recognize any guardian appointed without bond. See also *Benson* v. *Siemons*, 92 Misc. Rep. 509. My information is that the same position has been adopted by most of the justices of this court in this department. But be that as it may, I for one will not so construe the statute as to hold that where, as in the present case, a defendant has in good faith made a payment of money due to an infant to a person who has received from the Surrogate's Court or the Supreme Court an appointment as sole general guardian of the property of the infant, such payment does not discharge the obligation of the debtor merely because the payment or delivery of property was not also made to some other person as well.

It will be observed that the amendment of the Code does not constitute the "person designated in the order" as a guardian of the infant's property. Such a guardian is trustee of the ward's property and liable to account for it to his ward (*Matter of Camp*, 126 N. Y. 377, 389), and the trust is an express trust. *Mitchell* v. *Mitchell*, 170 App. Div. 452, 457. The statute under consideration does not confer upon the designated person any control of the money or property after its payment or delivery; it does not con-

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fer power upon him, either alone or jointly with the guardian, to designate the place of deposit, which deposit must be made in the name of the guardian alone; and it does not confer upon him any power to withdraw or remove such deposit. He has no responsibility to the wards of the person who is appointed as general guardian. He is not selected or nominated by them, even though they may be over the age of fourteen years. The surrogate by the act is given power to designate any person; he is not limited to selecting a clerk in his office for whose acts he would, under section 2475 of the Civil Code, be pecuniarily liable; and the person appointed in the present case is not appointed as a clerk but as an individual and under no responsibility of an official nature or character.

The "person designated in the order" clearly is not a co-trustee. He is a stranger having no office or function as trustee and having no relations of a trust character either toward the ward or toward the general guardian.

The judgment should not stand for another reason. It will be noted that it is not shown, either by the stipulated facts or by the pleadings, what was done with the money after it was paid to the general guardian, who was the father of the infants. It is not shown that the money was not deposited by the guardian in his name subject to the order of the surrogate; nor is it shown that it was not turned over by the former to the present general guardian of the infants. If the infants have sustained no loss, or, if the moneys were used for their support, it would be unjust to permit them to recover it a second time under the facts disclosed here merely to sustain a recovery for a technical violation of this extraordinary statute.

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I recommend that the judgment be reversed, with thirty dollars costs, and that upon stipulation of the parties the complaint be dismissed, with costs.

Judgment affirmed, with costs.

THE WHEELER SYNDICATE, INC., Plaintiff, v. JOHN N. WHEELER and JOHN N. WHEELER, INC., Defendants.

(Supreme Court, New York Special Term, March, 1917.)

Injunctions — action for — corporations — use of name — unfair trade competition.

Where defendant, the proprietor of a syndicate business, sold it and the right to use his name to a corporation, he may be restrained from engaging under his own name in the same kind of business in the same city, as may also a corporation thereafter formed by him to which he gave a name so similar as to cause such confusion and mistake as to amount to unfair trade competition.

THE nature of the action and the facts, so far as material, are stated in the opinion.

Taylor, Kelley, Becker & Roberts (Charles E. Kelley and Gilbert W. Roberts, of counsel), for plaintiff.

Brennan, Curran & Bleakley (John F. Brennan, of counsel), for defendants.

GIEGERICH, J. The action is brought to restrain the defendants from using the name "Wheeler" in the newspaper syndicate business. There is no substantial dispute as to the facts. The defendant John N. Wheeler, who had for a long time been engaged personally in the newspaper syndicate business under his own name, turned over to the plaintiff corporation when it was organized his business, receiving in return

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stock of that company. The corporate resolution by which Mr. Wheeler's offer was accepted enumerated, among other things received by the company, "the use of his name by this company." He was present as one of the directors at the meeting at which this resolution was adopted and voted for it and signed the corporation minutes as secretary. The agreed amount of the stock was issued to him in payment for the rights thus sold to the company, which proceeded to do business and prospered. After about three years the defendant Wheeler sold his stock in the company to one of the organizers of the company and resigned as a director and president, and in the conversation held with the purchaser of his stock that purchaser mentioned the fact that his (Wheeler's) "name belonged to the company," to which statement Wheeler made no reply. Shortly after Wheeler retired from the plaintiff company he formed the defendant corporation, to which he gave the name "John N. Wheeler, Incorporated," and began the same kind of business as the plaintiff had been and is still engaged in, which consists in retailing to various newspapers illustrations, fiction and miscellaneous literary material furnished to the syndicate by various people, by which method the material furnished receives wider circulation than it could otherwise have and can be furnished to the individual papers at a lower rate than could be otherwise afforded. Upon the trial the plaintiff showed that considerable confusion had arisen owing to the similarity of names and the like kind of business in which the two corporations were engaged. Customers of the plaintiff have addressed the defendants, and money due the plaintiff has been sent to the defendants, and complaints about service meant for the defendants have been sent to the

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plaintiff. Offers of new business, either by the plaintiff or by the defendants, have been mistaken by customers to whom such business has been offered. Upon such facts I think the plaintiff is entitled to the injunction sought. The case is not to be decided as though the defendant Wheeler were a stranger to the plaintiff and was starting in the same line of business as the plaintiffs under his own name or even the name "John N. Wheeler, Inc." He is under a special contract obligation to the plaintiff. The right to use his name which he sold to the plaintiff for a valuable consideration would be of little value if it were held that he was free to start in the same city in a directly competitive business under the circumstances shown in this case. The defendants' brief cites *Howe Scales Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 139, as an authority, and quotes the following language from the opinion: "In the absence of contract, fraud or estoppel any man may use his name in legitimate ways and as a whole or as a part of a corporate name." But in this case there is not an absence of contract, but the defendant Wheeler for a valuable consideration sold the use of his name to the plaintiff. So far as concerns the defendant John N. Wheeler, Inc., that corporation is so closely connected with John N. Wheeler, the individual, that the contractual disability which the individual has incurred applies also to the corporation which he has formed; but, quite apart from this consideration, there comes in with respect to the defendant corporation the equitable principle that a new corporation organizing to do business similar to the business of an existing corporation must avoid the adoption of a name so similar that under all the circumstances it will cause such confusion and mistakes as to amount to unfair trade com-

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petition. *Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Metropolitan Tel. & Tel. Co.* v. *Met. Tel. & Tel. Co.*, 156 App. Div. 577, 583; *German-American Button Co.* v. *Heymsfeld, Inc.*, 170 id. 416. There should be judgment for the plaintiff as prayed for, with costs. The requests for findings of the respective parties have been passed upon as indicated upon the margins thereof. Submit for my signature upon two days' notice of presentation a decision embodying, without change of language, all findings made by me, with proof of service.

Ordered accordingly.

MARGARET L. VARICK, as Executor and Trustee under the Last Will and Testament of ABRAHAM VARICK, Deceased, Plaintiff, *v.* MARY J. HIGGINS and Others, Defendants.

(Supreme Court, Bronx Special Term, March, 1917.)

Foreclosure — of mortgages — judgment of — actions — deeds — removal of cloud on title — when original mortgage is superior lien.

Where a creditor gives up a good security and accepts a worthless one in its place under a mistake of fact, he will be reinstated as to his original security if it can be accomplished without injury to the rights and equities of third persons.

In an action to foreclose a mortgage it appeared that B., one of the defendants, because of a recorded conveyance purporting to be made by her to H., the testator of one of the other defendants, was not made a party defendant in an action previously brought by plaintiff's predecessor in interest to foreclose the same mortgage. That action proceeded to a judgment and sale and the property was purchased by said testator who as part of the purchase price gave to plaintiff in said action, the predecessor in interest of the plaintiff in the present action, a purchase money mortgage for the same amount as the mort-

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gage under foreclosure, the balance of the purchase price being paid in cash. Seven years later, B. brought an action against H. to recover possession of the premises in question claiming that she never executed the purported conveyance to the testator of H. On the trial of the present action B., who in her answer alleged that said deed was a forgery, made no attempt to give evidence in support of such allegation and her counsel announced that he did not seek to impeach the deed. *Held*, that plaintiff was entitled to relief as against B. who rendered the present action necessary by her repudiation of the deed, prior to its institution, and by her confirmation of such repudiation in her answer.

That plaintiff, if so desirous, is entitled to a second judgment of foreclosure of the mortgage, the defendants other than B. making no objection, as such form of relief will have the effect as against B. of removing a cloud upon plaintiff's mortgage and settling the issue of the validity of the deed in question as between plaintiff and B.

That there should be judgment in favor of plaintiff entitling her to enforce the original mortgage and reviving the same as against the defendants as an existing security for the payment of the principal and interest due thereon and adjudging that said mortgage is a prior and superior lien and that she have the usual judgment of foreclosure and sale, with costs against defendant B.

The nature of the action and the facts, so far as material, are stated in the opinion.

Harris, Corwin, Moffat & Schek (John H. Corwin, of counsel), for plaintiff.

Blandy, Mooney & Shipman (Charles Blandy, of counsel), for defendant Margaret Burke.

GIEGERICH, J. The action is brought for the foreclosure of a mortgage. The facts are undisputed and are as follows: The plaintiff's predecessor in interest brought an action in the year 1907 to foreclose the

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mortgage now sought to be foreclosed, but did not make the defendant Margaret Burke a party defendant because there appeared upon the record a conveyance purporting to be made by her in her former name of Margaret Golden, to John Higgins, the testator of the defendant Mary J. Higgins. Had it not been for such conveyance the defendant Burke would have been a necessary party in that former action as, but for such conveyance, she would have been the owner of the equity in the premises under foreclosure. Such foreclosure action proceeded to a judgment and sale and the property was bought in by the said John Higgins, who, as a part of the purchase price, gave back to John L. Varick, the plaintiff in that action and the predecessor in interest of the plaintiff in this action, a purchase money mortgage for $4,300, that being the same amount as the mortgage under foreclosure, the balance of the purchase price being paid in cash. Subsequently, and in the year 1914, the defendant Margaret Burke brought an action to recover from the defendant Mary J. Higgins the possession of the premises in question, claiming that she never executed the deed aforesaid. In her amended answer herein the defendant Burke alleges that the deed referred to was a forgery. Upon the trial, the defendant Burke did not attempt to give any evidence in support of her claim that the said deed was a forgery, but, on the contrary, her counsel announced that he did not seek to impeach the deed, and now, upon the submission of the case for decision, he argues that, as that deed stands unchallenged, the fact is established that his client had no interest in the property at the time of the former foreclosure and that foreclosure was valid and the mortgage upon which it was brought has been paid and discharged and no longer has any existence, and, consequently, that there

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is no basis for any judgment whatever in favor of the plaintiff, and that the complaint should be dismissed as to the defendant Margaret Burke, with costs. On the other hand, the attorney for the plaintiff argues that in either aspect of the case, and whether the conveyance in question was a forgery or was valid, the plaintiff had good ground for bringing the action and is entitled to judgment in either event. If that deed was valid, then the argument is that, in view of the assertion of the defendant Burke to the contrary in the action above referred to and in her answer in this case, the plaintiff is entitled to a judgment to establish the validity of her security; while on the other hand, if the deed was a forgery, then, since the defendant Burke originally took title to the premises with a provision that she so took it subject to the original mortgage, the plaintiff is entitled to a judgment of foreclosure as against the defendant Burke because, as to her, the original action would have no effect as she was not made a party and that, as to her, the giving of the new mortgage did not have the effect of paying or discharging or otherwise affecting the original mortgage. In support of this latter position the counsel for the plaintiff relies upon the equitable doctrine that if a creditor gives up a good security and accepts a worthless one in its place under a mistake of fact, then such creditor will be reinstated as to his original security where it can be accomplished without injury to the rights and equities of third persons, citing *Gans* v. *Thieme,* 93 N. Y. 225, and cases in other states cited by Thomas Mort. (3d ed.) 386, n. 81, and citing also *Hyde* v. *Tanner,* 1 Barb. 75; *Lumber Exchange Bank* v. *Miller,* 18 Misc. Rep. 127. There would seem to be no question but that the plaintiff is entitled to some relief against the defendant Burke, who rendered

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the action necessary by her repudiation of the deed prior to its institution, and has rendered its prosecution necessary by her confirmation of such repudiation in her answer. The only question is the form which the relief should take. Inasmuch as it has to be taken as established now that the defendant Burke has no interest in the property, I do not think she has any standing to question the plaintiff's right to a second judgment of foreclosure of the mortgage if the plaintiff desires to take her relief in that form, since none of the other defendants object to such form of judgment. The record does not disclose what effect, if any, such form of judgment will have as between the plaintiff and the other defendants; but, at any rate, it will have the effect, as against the defendant Burke, of removing a cloud upon the plaintiff's security and settling the issue of the validity of the deed in question as between the plaintiff and the defendant Burke. My conclusion is that there should be judgment in favor of the plaintiff entitling her to enforce against the land and premises in suit the original mortgage in question and reviving the said mortgage as against the defendants herein as an existing security for the payment of $4,300 and interest thereon from April 20, 1916, and adjudging that the original mortgage is a prior and superior lien and that the plaintiff have the usual judgment of foreclosure and sale, with costs against the defendant Burke, as more specifically set forth in the conclusions of law found by me. The requests for findings of the respective parties have been found by me as indicated on the margins thereof. Submit for my signature upon two days' notice of presentation a decision embodying all findings made by me, with proof of service on the other side.

Ordered accordingly.

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HOWARD F. BERTINE, Plaintiff, v. NORTH RIVER INSURANCE COMPANY, Defendant.

(Supreme Court, New York Trial Term, March, 1917.)

Insurance (fire)—policy of—meaning of "specifically assumed"—actions—trial—when motion for verdict denied.

Whatever is embraced within the real meaning of the written portions of a policy of fire insurance designed to express the actual risk assumed is a "special" provision intended to satisfy printed conditions of exemptions from a risk.

Where the printed clause of a policy of fire insurance on machines and machinery of every description provides that the insurer shall not be liable for "loss to * * * patterns" unless liability is specifically assumed, and in the typewritten part of the policy the character of the risk assumed is stated to be "on all appurtenances, apparatus and supplies used in the business of the assured," liability for a loss on "patterns" which were models of castings to be formed for the assembling of printing presses in the course of the usual business of the assured was "specifically assumed" within the meaning of the policy.

MOTION for the direction of a verdict in an action on a policy of fire insurance.

Lewis H. Freedman and Francis C. Nickerson, for plaintiff.

Joab H. Banton, for defendant.

ERLANGER, J. The plaintiff is the assignee of a claim upon an insurance policy, issued by the defendant to the American Autopress Company, whereby the latter was insured against a fire loss "on machines and machinery of every description * * * and on all appurtenances, apparatus and supplies used in the business of the assured, all while contained in any place, point or building in the United States or Canada, including while in transit."

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A loss occurred upon a quantity of "patterns," which, as appears, were models of castings, to be formed for the assembling of printing presses in the course of the usual business of the assured, the castings being made in moulds formed by the use of the "patterns." It is obvious that, as a matter of ordinary intention, these patterns fell within the direct scope of the phrase "all appurtenances, apparatus and supplies used in the business of the assured," as employed in the typewritten part of the policy which thus specified the character of the risk assumed.

It is contended by the defendant, however, that property of this exact character was expressly excluded from the risk by the printed clause, in the body of the policy, which provided "this company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools or property held on storage or for repairs; * * *."

The question is, therefore, whether liability for a loss on "patterns" was "specifically assumed" by the typewritten clause first quoted, within the meaning of the policy. In my opinion, it was. The principle is quite well established that, as between the printed form of an insurance policy, containing words of exemption from a risk, and the written portions designed to express the actual risks assumed, the latter expression controls, and whatever is embraced within the real meaning of the general words, so written, is a "special" provision intended to satisfy the printed conditions. *Harper* v. *Albany Mutual Ins. Co.*,

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17 N. Y. 194; *Harper* v. *New York City Ins. Co.*, 22 id. 441; *Hall* v. *Insurance Co. of North America*, 58 id. 292; *Chadsey* v. *Guion*, 97 id. 333, 339; *Kratzenstein* v. *Western Assurance Co.*, 116 id. 54. Here the defendant company expressed its intention to assume a specified risk upon the "machinery" of the assured and on "all appurtenances, apparatus and supplies" used in its business. This risk it did "specifically assume," although in comprehensive words, and the "patterns" were within the risk so assumed. Nothing in the policy required that the property covered should be "specifically enumerated" to include patterns, and, within the rule of the authorities above cited, I have no doubt that the plaintiff is entitled to a recovery. These patterns were certainly "appurtenances" to the business or to the machinery. Indeed, they would probably fall within the description of "machinery" if that term were employed alone. *Buchanan* v. *Exchange Fire Ins. Co.*, 61 N. Y. 26, 33. The case of *Johnston* v. *Niagara Fire Insurance Co.*, 118 N. C. 643, cited for the defendant, proceeded upon the use of the words "other articles," not necessarily related to "appurtenances," and may thus be distinguished, but so far as it suggests a construction which might aid the defendant it is opposed to the well-reasoned authority of *Furlong & Meloy* v. *North British & M. Ins. Co.*, 136 Iowa 468, and to the rule applied in this state in the cases to which I have referred.

My conclusion is that the plaintiff has established his cause of action and that the defendant's motion for the direction of a verdict should be denied. Verdict directed for plaintiff in the sum of $2,124.33, as of March 1, 1917, the day of trial.

Motion denied.

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HENRY I. CLARK, Individually and as a Member of the Copartnership Firm of Henry I. Clark & Co.; HERBERT H. CLARK, Individually, and as a Member of the Copartnership Firm of Henry I. Clark & Co.; HENRY L. CLARK, as a Member of the Copartnership Firm of Henry I. Clark & Co.; JOSIAH H. CLARK, as a Member of the Copartnership Firm of Henry I. Clark & Co.; ADA H. CLARK, Individually; ABRAHAM SARTORIUS, Individually, and as a Member of the Copartnership Firm of Sartorius & Einstein, and SAMUEL EINSTEIN, as a Member of the Copartnership Firm of Sartorius & Einstein, Suing in Their Own Behalf and in Behalf of all Other Preferred Stockholders of the Keokuk and Des Moines Railway Company, Similarly Situated, Plaintiffs, *v.* BANKERS TRUST COMPANY, as Trustee, and KEOKUK AND DES MOINES RAILWAY COMPANY, Defendants.

(Supreme Court, New York Special Term, March, 1917.)

Equity — when action in, maintainable — jurisdiction — constitutional law — corporations — parties — injunctions.

Where a court of equity has jurisdiction of the person, an action to restrain the prosecution of an action brought by him in a federal court of another state is neither a violation of the comity existing between the several states nor in violation of the Constitution of the United States and the laws passed under it having reference to the full faith and credit to be given to judicial proceedings in another state.

Where the necessary parties are before a court of equity it is immaterial that the *res* of the controversy is beyond the territorial jurisdiction of the court.

An action in equity is maintainable by stockholders for the purpose of avoiding any improper transaction consummated at the expense of the corporation either by it or the lessee of its franchise and such right of action passes with a transfer of stock.

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Where a corporation when insolvent or financially embarrassed transfers its property to a new company having the same shareholders, the transaction though binding between the parties cannot defeat the claim of a non-assenting creditor and as to it such a transfer is void in equity regardless of the motive with which it was made.

The plan for the reorganization of a corporation, which as lessee operated a railway system, made no provision for unsecured creditors except that all claims against it would be contested or otherwise dealt with as its receiver or the new company or the joint reorganization committee or other proper authority might determine. Prior to the appointment of said receiver the stockholders of the lessor brought an action in equity against its lessee claiming mismanagement of the leased property and violations of the lease. *Held*, that as by the prosecution of a creditors' bill in a federal court in another state by the trustee for bondholders, in connection with the reorganization proceedings, the causes of action and rights of the unsecured creditors of the lessee, particularly the causes of action of the plaintiffs as preferred stockholders of the lessor, would be wholly or in part defeated, the prosecution of the creditors' bill will be enjoined, plaintiffs having been refused intervention in such proceedings.

APPLICATION to continue an injunction.

James J. Franc (William N. Cohen, James J. Franc and Samuel H. Guggenheimer, of counsel) for plaintiffs.

Ingraham, Sheehan & Moran (George L. Ingraham, of counsel), for defendant Bankers Trust Company.

NEWBURGER, J. The complaint herein alleges that the defendant the Keokuk and Des Moines Railway (referred to in the proceedings as the lessor) is a corporation organized under the laws of the state of Iowa, owning and operating a railroad of 162 miles between the city of Keokuk, Iowa, and Des Moines, in the same state, and having an office in this city. That the outstanding capital stock of said railway company

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consists of 26,004 shares of common stock and 15,246 shares of eight per cent non-cumulative preferred stock. That the stocks have since 1878 been listed on the New York Stock Exchange. That the plaintiff Henry I. Clark is the owner of 3,604 shares of the preferred stock of the railway company. That the plaintiff Herbert H. Clark is the owner of 100 shares of the preferred stock. The plaintiff Ada H. Clark is the owner of 45 shares of the preferred stock. The plaintiffs, the copartnership firm of H. I. Clark & Co., are the owners of 70 shares of the preferred stock. The plaintiff Abraham Sartorius is the owner of 100 shares of the preferred stock, and the plaintiffs Sartorius & Einstein the owners of 300 shares of the preferred stock. That the Chicago, Rock Island and Pacific Railway Company (herein called the lessee), a corporation existing under the laws of Illinois and Iowa, having offices in Chicago, Illinois, is engaged in operating a railway system through various western states, and is a consolidation of the Chicago, Rock Island and Pacific Railroad Company and of various subsidiary railroad corporations. That by virtue of such consolidation the railway company assumed all of the liabilities, and succeeded to all of the franchises, leases and other rights of the Chicago, Rock Island and Pacific Railroad Company, including all the rights granted by the defendant Keokuk and Des Moines Railway Company under and by virtue of the lease dated on or about the 14th day of May, 1878, which lease was executed and delivered in the city of New York. That on the first day of October, 1878, the lessee entered upon and took possession of the franchises, privileges, railroad rights and all other demised property of the lessor, and was also the owner of the majority in interest of all the outstanding stock of the lessor. That about June 2, 1880, the

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Chicago, Rock Island and Pacific Railway Company, by virtue of the consolidation, assumed all the rights of the lessee in the property of the lessor, and has up to the present time exercised the entire and exclusive management of all the railroad of the lessor. That by reason of its control the lessee has elected all of the members of the board of directors of the lessor. That the plaintiffs on or about the 26th day of June, 1914, as preferred stockholders of the Keokuk road, in their own behalf and all other stockholders similarly situated, commenced an action in this court against the Chicago, Rock Island and Pacific Railway Company and the Keokuk and Des Moines Railway Company alleging among other things that said action could not be brought by the lessor against the lessee by reason of the lessee's control of the lessor, as it was impossible to obtain the consent of the board of directors of the lessor. That by the terms of the lease hereinbefore referred to the lessee covenanted to pay for the use of the railway for each year commencing October, 1878, and during the demised term up to December, 1923, a sum equal to twenty-five per centum of the gross earnings per year from the operation of the road of the lessor, and that in any event the lessee would pay as rental a minimum sum of $137,500 per year, being the amount of interest due annually upon the underlying mortgages of the lessor. That the lessee further agreed that it would render to the lessor on the first day of January in each year a statement for the year ending on the 30th day of September previous of the earnings of the leased property. The complaint further alleges a large number of violations and breaches of the lease hereinbefore referred to. That by reason of such violations the defendant Keokuk and Des Moines Railway Company has been, since the 26th day of June, 1914, and still is, an

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unsecured creditor of the Chicago, Rock Island and Pacific Railway Company of upwards of $5,000,000. That after said action had been commenced in this court the defendants, the lessee and lessor herein, caused said action to be removed from this court into the District Court of the United States for the Southern District of New York. That subsequently, upon the application of the plaintiffs herein, who were also the plaintiffs in that action, the United States District Court for the Southern District of New York duly remanded to this court said suit. That the lessee herein served its separate answer in that action by Messrs. White & Case, members of this bar, and the lessor served a separate answer by Irving S. Olds, who, it is claimed, was associated with the said firm of White & Case. That on the 6th day of January, 1915, the parties to said action by stipulation referred the issues to Lewis L. Delafield, Esq., as sole referee, to hear and determine. That said stipulation also provided that if the referee determined that an accounting was necessary he was to proceed to take and state the same. That the said referee proceeded with the hearing, and the attorneys of the respective parties entered into certain stipulations as to certain facts, and about 375 pages of testimony were taken and 116 exhibits were introduced in behalf of the plaintiffs. That in the month of February, 1915, further hearings before the referee were suspended because of the refusal of Mr. Frank May, a witness called on behalf of the plaintiffs, to return to the jurisdiction. That said witness is the comptroller of the lessee and is a resident of Chicago, state of Illinois. That on the 20th day of April, 1915, an action was instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division, by the American Steel Foundries,

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as complainant, against the Chicago, Rock Island and Pacific Railway Company, the lessee herein, as an unsecured creditor of the said railway for $15,818.46. That in said action the railway company admitting its insolvency, receivers of all the railroad, its assets, rights and franchises, were appointed. That thereafter the said receivers applied to the United States District Court for the Northern District of Illinois, Eastern Division, for authority to renounce the lease from the Keokuk road to the Chicago, Rock Island and Pacific Railway Company. That on such application the plaintiffs herein appeared by their solicitor and objected to the renunciation of said indenture of lease, and the matter was referred to a special master. That several hearings were held by the master, the last one in the fall of 1915, and said proceedings for renunciation are still pending and undetermined. That on or about the 5th day of January, 1917, Lewis L. Delafield, Esq., the referee heretofore referred to, fixed the further hearing of the reference for the 9th day of February, 1917, of which due notice was given to the respective attorneys. That on the 20th day of April, 1915, certain holders of the capital stock of the Chicago, Rock Island and Pacific Railway Company formed a protective committee known as the "Amster committee," and certain other holders of the capital stock formed a protective committee known as the "Hayden committee." That in July, 1915, certain holders of the twenty-year five per cent gold debentures of the Chicago, Rock Island and Pacific Railway Company formed a protective committee known as the "debenture committee," and Mr. Seward Prosser, then and now the president of the defendant Bankers Trust Company, was made its chairman. That in May, 1916, an agreement for the reorganization of the Chicago, Rock Island and Pacific

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Railway Company was entered into between the several committees heretofore referred to, and a "joint reorganization committee" was formed with Mr. Seward Prosser as chairman. That said joint reorganization committee published a plan and agreement for the reorganization of the said railroad and depositaries were named. That the firm of White & Case, who were counsel for the railroad in the first suit, were also counsel for a time of the receivers, counsel for the defendant Bankers Trust Company, the debenture committee and the joint reorganization committee. That said firm of lawyers selected the American Steel Foundries as complainant in the receivership cause in the United States court, aided in the preparation of the bill of complaint in said action, and selected the solicitors for the complainant in said cause. That on the 17th day of January, 1912, the defendant Bankers Trust Company was selected as trustee for the benefit of the holders of the five per cent gold debentures hereinbefore referred to. That default has been made upon the interest due upon said debentures, and that the holders of more than one-fourth in amount of said debentures have made request for the trustee to declare the principal of said debentures due and payable, which said trustee did. That several members of the different reorganization committees have become members of the board of directors of the Chicago, Rock Island and Pacific Railway Company. That the defendant Bankers Trust Company, as trustee as aforesaid, contrary to equity, good conscience and fair dealings, confederated and conspired with a majority of the board of directors of said railway company and the several reorganization committees for the purpose of hindering, delaying, impeding, ruining and embarrassing, and wholly or in part defeating the causes of action and rights of the unsecured cred-

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itors of the Chicago, Rock Island and Pacific Railway Company, particularly the causes of action of the plaintiffs as preferred stockholders of the Keokuk road. That in pursuance to said general conspiracy the several parties heretofore referred to have instituted certain proceedings in the said District Court of the United States by the defendant Bankers Trust Company, as trustee, filing its petition for leave, as trustee, to prosecute an action at law in said court for the principal and interest of the $20,000,000 five per cent gold debentures of said railway company, and that on the 23d day of January, 1917, judgment was recovered by the said Bankers Trust Company for the amount of the principal and interest, and that execution was issued on said judgment to the marshal of the district, who, on the 30th day of January, 1917, returned the same with the indorsement "no property found and no part satisfied." That on or about the 3d day of February, 1917, the defendant Bankers Trust Company, as trustee, filed a petition for leave to institute a bill in equity against the railway company, and a copy of said petition was served by mail on Henry I. Clark, one of the plaintiffs herein, and on James J. Franc, the attorney for the plaintiffs herein, although no notice had been served upon either of the filing of the petition upon which the judgment at law was obtained. That the plan and agreement for the reorganization of the said railway company makes adequate provision for the stockholders and the holders of the gold debentures of said railway company, but makes inadequate, insufficient and inequitable provision for the unsecured creditors of said railway company, and makes no provision whatsoever in favor of the defendant Keokuk and Des Moines Railway Company or the plaintiffs herein as its preferred stockholders. That the object of the

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proposed creditors' bill was to require all the unsecured creditors and the plaintiffs herein to litigate their claims before the special master in the proceedings instituted in the United States court. That the plaintiffs have expended in the suit instituted by them in 1914 large sums of money for attorneys, railway engineers, stenographers and other disbursements which will be lost unless they be permitted to proceed with their 1914 suit, and that they have no adequate remedy at law. The prayer of the complainant seeks to enjoin the defendants from proceeding with the proceedings instituted in the United States court by the Bankers Trust Company, or from doing anything whereby the unsecured creditors of the railway company, particularly the Keokuk and Des Moines Railway Company, and the plaintiffs herein, may be defeated in the enforcement of their claims and causes of action. Attached to the moving papers are the pleadings in the 1914 action instituted by the plaintiffs and the proceedings thereunder had. The answering affidavits of the defendant Bankers Trust Company deny that there was anything in the plan of reorganization that was intended to destroy or does destroy or impair any valid or enforcible claim against the Chicago, Rock Island and Pacific Railway Company, and deny that the object and purpose of the bill of the Bankers Trust Company is intended to circumvent or defeat the claim of the Keokuk and Des Moines Railway or the plaintiffs, and that the claim of the plaintiffs or the Keokuk railway is in dispute and is now subject to investigation by this court in the suit now pending. The defendants also deny any conspiracy and allege that all of the proceedings in behalf of the Bankers Trust Company have been instituted in good faith and simply in discharge of its duties as trustee and under advice of counsel as to the proper

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method of enforcing the rights of the debenture holder. That the plan of reorganization reserves the power to issue preferred stock to an amount not exceeding $15,000,000 for unsecured creditors. There is an affidavit of the managing clerk of White & Case setting forth the proceedings taken in the 1914 suit of the plaintiffs. The answer of the Bankers Trust Company denies any conspiracy or that any proceeding taken in connection with the reorganization of the Rock Island road and in the undertaking of any suit or proceeding in the United States court was for the purpose of injuring plaintiffs or the defendant Keokuk railway. That the District Court of the United States for the Northern District of Illinois, Eastern Division, had before the commencement of this action taken jurisdiction of the affairs of the Chicago, Rock Island and Pacific Railway Company, of the disposition of its property and all claims against it, and therefore this court had no jurisdiction to interfere with or enjoin the proceeding in said United States District Court. Attached to the answer are several exhibits, among them one marked Exhibit B, being the order of the United States District Court judge refusing leave to the plaintiffs to file on behalf of the Keokuk and Des Moines Railway Company their petition to intervene in the receivership proceeding. A preliminary injunction was granted herein, and I am now asked to continue same during the pendency of this action. It has been repeatedly held that a court of equity having jurisdiction of the person may restrain such person from prosecuting a suit in another state, and that such action was not a violation of the comity existing between the several states and not in violation of the Constitution of the United States and the laws passed under it having reference to the full faith and credit to be given to the judicial proceedings in another state, and that where the neces-

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sary parties are before a court of equity it is immaterial that the *res* of the controversy is beyond the territorial jurisdiction of the court. Without regard to the situation of the subject matter such courts consider the equities between the parties and decree *in personam* according to those equities and enforce obedience to their decrees by process *in personam*. *Phelps* v. *McDonald*, 99 U. S. 308; *Cole* v. *Cunningham*, 133 id. 107; *Vail* v. *Knapp*, 49 Barb. 305; *Dinsmore* v. *Neresheimer*, 32 Hun, 204; *Webster* v. *Columbian National Life Ins. Co.*, 131 App. Div. 837; affd., 196 N. Y. 523; *Gibson* v. *American Loan & Trust Co.*, 58 Hun, 443. This court has the power to prevent those who are amenable to its own processes from instituting or carrying on suits in other states which will result in injury or fraud. It is not disputed that the plaintiffs in 1914 instituted their action and that the same was at issue months before the Rock Island receivership and long before there was any default in the payment of the principal and interest on the debenture bonds of the Chicago, Rock Island and Pacific Railway Company. That the plaintiffs Sartorius and Einstein are and have been for many years citizens of this state, and they with the other plaintiffs have been for years preferred stockholders of the Keokuk and Des Moines Railway Company. The effect of the institution of the creditors' bill filed by the defendant Bankers Trust Company in the United States court unquestionably would nullify any proceeding heretofore taken by the plaintiffs. Plaintiffs had a perfect right, as stockholders of the Keokuk Company, to bring an action for the purpose of avoiding any improper transaction consummated at the expense of the corporation, either by the Keokuk corporation or the lessee of its franchise and railway system, the Rock Island corporation. As was said by Mr. Justice Hiscock in *Pollitz* v. *Gould*,

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202 N. Y. 15: "A stockholder has an indivisible interest in the property and assets of a corporation subject to the discharge of its obligations. This indivisible interest generally speaking is represented by certificates of stock and is transferred by their transfer. The general character of these certificates and the effect of their transfer in passing the interest of the holder is too well established and understood to require any discussion. As an original proposition it would seem to be clear that a right of action by or in behalf of the corporation for fraud to set aside a conveyance of its assets or to avoid obligations imposed upon it is part of its rights, property and assets in which a stockholder has this indivisible interest transferable by the transfer of his certificates." See *Continental Sec. Co.* v. *Belmont,* 206 N. Y. 7. The creditor's bill in the United States court would injure plaintiffs in their action as stockholders of the Keokuk railway to recover such damages as they might show occurred through the action of the directors of the Rock Island road, and for which they brought the action in 1914. It is apparent that the refusal of the United States court to permit the plaintiffs to intervene in the creditor's suit by the Bankers Trust Company prevented plaintiffs from proving the cause of action which they claim arose by reason of the Rock Island Railway Company's failure to carry out the terms of the lease between said railway and the Keokuk Company. In *Northern Pacific Ry.* v. *Boyd,* 228 U. S. 482, it was held, at page 502: "4. Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues, with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between the bondholders and stockholders; and

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though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made; for if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company (cf. *San Francisco & N. P. R. R.* v. *Bee*, 48 Cal. 398; *Grenell* v. *Detroit Gas Co.*, 112 Mich. 70). There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree." And at pages 504–505: "For, if purposely or unintentionally a single creditor was not paid or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors, who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor was invalid. Being bound for the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim, they were none the

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less bound to recognize his superior right in the property, when years later his contingent claim was liquidated and established. That such a sale would be void, even in the absence of fraud in the decree, appears from the reasoning in *Louisville Trust Co.* v. *Louisville Ry.*, 174 U. S. 674, 683, 684, where 'assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder),' the court said that 'no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. * * * Any arrangement of the parties by which subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.'" See *Kansas City Ry.* v. *Guardian Trust Co.*, 240 U. S. 166. The plan of reorganization proposed by the several committees of the Chicago, Rock Island and Pacific Railway Company, as appears from the printed form marked Exhibit I of the plaintiffs' complaint, after referring to the scope and effect of the reorganization, at page 15 says: "Certain of the more important claims existing or asserted against the railway company and — or its receiver, or hereafter to become due, are below enumerated. *The list does not include* amounts claimed for damages for personal injuries, or freight claims, or *amounts claimed for damages in litigations.* The joint reorganization committee has endeavored to procure full and correct figures, but it assumes no responsibility whatsoever for the completeness or correctness of the information given below; nor is the fact that any claim is below

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listed (or is referred to as a liability) to be deemed in any sense an admission of the validity thereof, but every such claim will be contested, compromised, settled, paid or otherwise dealt with as the receiver or the new company, or the joint reorganization committee, or other proper authority, may determine." It will thus be seen that no provision has been made for unsecured creditors except that all claims will be contested or otherwise dealt with as the receiver or the new company or the joint reorganization committee or other proper authority may determine. In other words, plaintiffs, having come into a court of equity having jurisdiction of the persons of the parties against whom they have charged improper acts on the part of the trustees in the management of the railway company, are to be deprived of their day in court and submit their claims to a body of men in the selection of whom they have had no voice. To enforce such an agreement as against the plaintiffs would be inequitable and oppressive. See opinion of Circuit Judge Hook in *Guaranty Trust Co.* v. *Missouri Pacific Ry.*, 239 Fed. Repr. filed November 27, 1916. For the reasons stated the application to continue the temporary injunction *pendente lite* is granted.

Motion granted.

Matter of Acquiring Title to NAGY STREET, from Grand Street to Metropolitan Avenue, Borough of Queens.

(Supreme Court, Kings Special Term for Motions, March, 1917.)

Condemnation proceedings — power of board of estimate in — street opening proceedings — title — when motion to amend proceeeding denied — Greater New York Charter, § 992.

Under section 992 of the Greater New York Charter, added by chapter 606 of the Laws of 1915, relating to street opening

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proceedings, and which provides that "The resolution of the board declaring any such proceeding discontinued shall effect the discontinuance of such proceeding or such part thereof as may be discontinued," and further providing for the payment of the expenses incurred by the property owners of the portion of the street that is eliminated, the power of the board of estimate to discontinue proceedings before title to lands sought to be acquired has vested in the city is absolute without any application to the court; such provision, being merely a change in procedure, applies to a proceeding commenced before the enactment of said section.

At the time of the institution of the proceedings authorized by the original resolution of the board of estimate there was a house which stood in the line of the improvement and, when it was subsequently destroyed by fire, the owner, in consequence of and in reliance upon the good faith of the board of estimate in notifying her that if she built upon the old site she might not recover in the proceeding the value of the building, erected a new building on the line of the proposed street making entrances to it from that street. Under an amended resolution thereafter adopted the plan of the new street will not be opened near her property and, as a result, she claims substantial damages. Upon a motion to amend the proceedings to conform to the amended resolution of the board of estimate, *held*, that though the board should have considered the situation of said property owner before it made the change by which she would be absolutely deprived of her street frontage in the face of her protests and of the presentation of the facts and circumstances showing her good faith, the action taken by the board was within its legal power and said property owner must be held not to have any legal cause for complaint.

That as under the amended resolution the owners of the property abutting on the portion of the street which is not eliminated are burdened with the total expense of the entire proceeding, including the expense incurred in connection with the properties lying in the portion of the street that it is proposed to eliminate, a motion to amend the proceeding should be denied, the amended resolution being illegal in that it attempted to require said property owners to pay expenses which should and must be borne by the city.

MOTION to amend in condemnation proceedings.

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Lamar Hardy, Corporation Counsel (Joel J. Squier and John J. Kearney, of counsel), for motion.

Edward W. Murphy, for Anna J. Doyle, opposed.

Skinner & Bermant, for Mathius Siebert and others, opposed.

William E. Donavin, for John N. Andren and others, opposed.

William A. R. Keyse, for Caroline F. Stines, opposed.

Philip B. La Roche, Jr., for Ignacs Schrey, opposed.

CROPSEY, J. An unusual situation is presented upon this motion. It is fortunate that it is unusual, for it shows that the rights of property owners have not been regarded. This situation is created by a change of decision by the board of estimate of the city. This proceeding was authorized by that board in November, 1905, and again by further resolution in March, 1907, and a still further amended resolution was adopted in June, 1911. The commissioners were appointed in November, 1911. The proceeding contemplated the opening of Nagy street from Metropolitan avenue to Grand street. Hearings were had before the commissioners extending over a number of years and in June, 1914, the preliminary report was made. Another year's delay followed on the hearing of the objections and the making of the final report of awards and the taxing of the costs. This had been done finally in May, 1915. Then with the proceeding practically finished the board of estimate took up the consideration of amending the city map and adopting

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an amended resolution affecting this proceeding. After another year's delay in April, 1916, that board decided that Nagy street should be opened only between Metropolitan avenue and Jansen avenue. That is that portion of Nagy street included in the original proceeding and lying between Jansen avenue and Grand street was eliminated. Under the original plan the street was to run straight from Metropolitan avenue to Grand street. Under the amended plan the street runs straight from Metropolitan avenue to Jansen avenue and from there turns to the east at a considerable angle.

Now the city moves to amend this proceeding to conform to the amended resolution of the board of estimate. The action of the board was not taken upon the application of any property owner but was of the city's own motion and is said to have been taken to correct some blunder of a city official. The changes that would result from the amendment of the proceeding would be prejudicial to the property owners both on the portion eliminated and on the portion remaining. On the portion eliminated the owners have spent money for lawyers' fees and other expenses in proving their title and establishing their damages. It may be that they can recover these expenses under section 992 of the charter (Laws of 1915, chap. 606, in effect May 12, 1915), provided they make application to the court within one year after the adoption of the amended resolution by the board of estimate. But there is one owner in the eliminated portion who is in a different situation.

At the time this proceeding was commenced Anna J. Doyle owned a house which stood in the line of the improvement. This subsequently was destroyed by fire and she made inquiry to learn if it could be rebuilt on the old site. The public officials advised her of the

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pendency of this proceeding and notified her that if she built on the old site she might not recover in this proceeding the value of the building under the authorities to which her attention was called. *Matter of City of New York (Hawkstone Street)*, 137 App. Div. 630; affd., 199 N. Y. 567; *Matter of City of New York (Briggs Avenue)*, 196 id. 255. In consequence and relying upon the good faith of the board of estimate she erected the new building on the line of the proposed street making entrances to it from that street. Under the amended plan the street will not be opened near her property and she claims to have sustained substantial damage as the result.

The owners of the property abutting on the portion of the street which is not eliminated are burdened, under the amended resolution, with the total expense of the entire proceeding including the expense incurred in connection with the properties lying in the portion of the street that it is proposed to eliminate. About 1,100 pages of testimony were taken by the commissioners and of this about 700 pages, or about two-thirds of the whole number, were taken up with the testimony relating to the portion of the street now sought to be eliminated. The entire expense of those hearings, not only of the commissioners but also of the city and its experts, it is proposed to charge against the property owners on the remaining portion.

At the threshold of the consideration of this matter the court is met with the question of power. The corporation counsel contends that there is no discretion in the court and that the order sought must be granted and that there is no power in the court to impose any terms. His claim is that the right of the board of estimate to discontinue proceedings is absolute, up to the time that the final report has been confirmed or title has vested. A study of this question reveals a

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conflict in the decisions, some of them holding there is no right to discontinue, others that the right exists in the local authorities in the absence of a statutory provision and that it can be exercised without applying to the court, and still others holding that application must be made to the court. Apparently it is generally conceded that such power may be given to the local municipal authorities by the legislature and if it is that it is controlling.

The English rule is that such proceedings cannot be discontinued. *The King* v. *Commissioners for Improving Market Street, Manchester,* 4 B. & A. 333; *The King* v. *Hungerford Market Company,* id. 592; *Stone* v. *Commercial Railway Co.,* 4 Mylne & C. 122; *Tawney* v. *Lynn & Ely Railway Co.,* 16 L. J. (N. S.) Ch. 282; *Walker* v. *Eastern Counties Railway Co.,* 6 Hare, 594. This rule, however, has not been followed in this state. The earlier authorities were in conflict as to whether it was necessary to apply to the court in order to effect a discontinuance. *Matter of Beekman Street,* 20 Johns. 269; *Corporation of New York* v. *Mapes,* 6 Johns. Ch. 46; *People ex rel. Dikeman* v. *Corporation of Brooklyn,* 1 Wend. 318; *Matter of Canal Street,* 11 id. 155; *Matter of Anthony Street,* 20 id. 618; *Martin* v. *City of Brooklyn,* 1 Hill, 545. These cases were all decided at a time when the statute was silent on the question. 2 R. L. of 1813, 408, §§ 177, 178. And since then where there is no statutory provision, it has been held that the court has the discretion of granting a discontinuance and that it cannot become effective without the court's action. *Matter of Commissioners Wash. Park,* 56 N. Y. 144; *Matter of Waverly Water Works Co.,* 85 id. 478; *Matter of Trustees of White Plains,* 65 App. Div. 417; *Matter of South Market Street,* 76 Hun, 85–91. There are a number of authorities holding that application to the court is unneces-

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sary but they arose in cases in which there was no statutory provision on the subject.

In 1839 (Laws of 1839, chap. 209, § 7) the legislature conferred upon the local authorities power to discontinue these proceedings without applying to the court. This was later enacted in the Consolidation Act (Laws of 1882, chap. 410, § 1003) and continued in force until the adoption of the first charter of the city of Greater New York. By that charter (Laws of 1897, chap. 378, § 1000) the power of the local board to discontinue proceedings was stated but that portion of the former provision which expressly dispensed with the necessity for court action was omitted. This omission and modification would seem to be conclusive upon the intention of the legislature that these proceedings could not be discontinued without the court's sanction, but the courts have held otherwise. *Matter of City of New York,* 34 App. Div. 468; *Matter of City of New York (Mt. Vernon Avenue)*, 52 Misc. Rep. 319; affd., 127 App. Div. 650; affd., 193 N. Y. 658; *People ex rel. Wynne* v. *Morris,* 143 App. Div. 293.

Whatever question there was as to the power of the board of estimate, under the provisions of the charter just referred to, it has been set at rest by the enactment of 1915. Chapter 606 of the laws of that year made a number of amendments to the charter relating to these proceedings. Among other things it enacted a new section (992). This contained the substance of the former section (1000), but also this new sentence: "The resolution of the board declaring any such proceeding discontinued shall effect the discontinuance of such proceeding or such part thereof as may be discontinued." Under this, the power of the board of estimate to discontinue proceedings before title has vested is absolute. And this provision, though enacted after this proceeding was com-

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menced, applies to it, for it is merely a change in procedure. *Matter of City of New York,* 34 App. Div. 468–470. Under this section no application to the court is necessary.

But this is not an application for a discontinuance. It is to " amend " a pending proceeding. An amendment might be the same as a discontinuance of the proceeding in part for it might consist merely in eliminating a portion of the street to be opened. If this were so, merely calling it a motion to amend might not change its character and it might be deemed a motion to discontinue, for under the new section 992 the power to discontinue either in whole or in part is granted. In fact the courts had previously held that the power to discontinue in part necessarily existed under the grant of a general power to discontinue. *Matter of City of New York* (*Mt. Vernon Avenue*), 127 App. Div. 650–656; affd., 193 N. Y. 658; *Matter of City of New York,* 52 Misc. Rep. 319; affd., 127 App. Div. 650; affd., 193 N. Y. 658. By this motion more than a mere elimination of a portion of the street is sought. The amended resolution of the board eliminates several blocks but also includes a portion of the new Hagy street which was not included in the original resolution.

The power to amend proceedings is not possessed by the board of estimate but is expressly given to the court. Greater N. Y. Charter, § 994, enacted by Laws of 1915, chap. 606, being substantially the same as former § 974. The board of estimate had no inherent powers, having only such as the statute gives it. *Matter of City of Johnstown* (*South Market St.*), 76 Hun, 85–89. In a proper case the court should grant an amendment. But is this such a case?

In determining that the rights of the property owners must be considered. As has already been

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pointed out, the provision of the charter (§ 992) provides for the payment of the expenses incurred by the property owners of the portion of the street that is eliminated. This answers any objection they could raise, for such a provision is constitutional. *Whitney* v. *Lynn*, 122 Mass. 338; *Sanitary District* v. *Bernstein*, 175 Ill. 215; *Chicago & W. I. R. R. Co.* v. *Guthrie*, 192 id. 579; *Chicago & S. Co.* v. *Flaherty*, 222 id. 67; *Deneen* v. *Unverzagt*, 225 id. 378; *Wiler* v. *Logan Nat. Gas & Fuel Co.*, 6 Ohio C. C. (N. S.) 206; affd., *sub nom. Logan Nat. Gas & Fuel Co.* v. *Wiler*, 72 Ohio St. 628; *Mellichar* v. *City of Iowa City*, 116 Ia. 390.

It may be a question whether the property owner whose house was burned and who built on the line of the proposed street in compliance with the requirements of the city officials can recover her damages under this section, but this need not be determined, for even if she cannot her objection would not be a sufficient ground for refusing this application as she would have no cause of action for her damages in the absence of a statutory provision. *Martin* v. *City of Brooklyn*, 1 Hill, 545–548; *Whyte* v. *City of Kansas*, 22 Mo. App. 409; *Shanfelter* v. *City of Baltimore*, 80 Md. 483. In *Matter of City of New York* (*Beekman St.*), 20 Johns. 269, the court refused to permit a discontinuance after property owners had built in accordance with the line of the proposed street, but this was decided when there was no statutory provision giving the local authorities the power to discontinue and when the court's discretion could be exercised.

The situation of this property owner in the present proceeding should have been considered by the board of estimate before it adopted the amended resolution. When her house burned she was in a sorry fix. If she built on the old site and then the street came through

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she might have no claim for structural damages under the cases already cited. So she relied upon the action of the board of estimate and did what an honorable, high-minded citizen would do, namely, built on the new line. One would naturally think she would have the right to rely on the board of estimate and that she would not be misled and deceived by it to her damage. But after she had erected her new building on the line of the proposed street, because this proceeding was pending, the amendment was made which absolutely deprived her of that frontage. And this change of attitude by the board of estimate was made in the face of her protests and of the presentation of the facts and circumstances showing her good faith and her damage. But as long as the board of estimate has this power under the law the courts cannot interfere with it unless in its exercise some constitutional rights are invaded. Under the authorities this unfortunate property owner must be held not to have any legal cause for complaint.

The question of assessing the entire expense of the proceeding upon the property abutting on the portion of the street that remains presents, however, an entirely different question. It has been pointed out that two-thirds of the testimony related to the portion of the street sought to be eliminated and that all the expense connected with that must, if this amendment is allowed, be borne by property owners who have derived no benefit from it. In fact no property owners have derived any benefit from those expenses. They have been merely wasted because of the change of opinion by the board of estimate. On what theory such an unfair and unjust levy could be made does not appear.

Under the Constitution the expenses of opening streets are to be paid "by the person to be benefited."

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Art. I, § 7. The property owners abutting on the portion of the street that is to remain must pay for the expenses incurred in connection with that portion. This is entirely proper and no complaint is made of that. They do, however, complain and justly against being compelled to pay for the great expense rendered useless by the change of decision by the board of estimate. Instead of being benefited by the proposed change in the street, these property owners are really damaged, for they lose the direct straight access to Grand street. The expenses in question have not been incurred for the public benefit. They have merely been wasted and an assessment cannot be levied for them. *Matter of City of New York* (*Mt. Vernon Avenue*), 127 App. Div. 650, 653, 654; affd., 193 N. Y. 658.

It may be that this method of trying to make the property owners pay for the city's blunder would save the city from making the payment, and this may be claimed to show an efficiency or economy on the part of the city. But the city cannot be economical at the expense of the property owner, and it must be just, even though it would be economical. The power to levy an assessment for a local improvement exists only where it is expressly conferred by legislative authority. *Ne-ha-sa-ne Park Assn.* v. *Lloyd*, 167 N. Y. 431–436. There is no authority for levying such an assessment as is here sought to be done. The property owners cannot be made to pay those expenses. *Matter of City of New York*, (*Rosedale Ave.*), 175 App. Div. 864. To impose such an assessment would be unconstitutional. The legislature has the power to impose assessments in the exercise of its right to tax but that power is not absolute and unqualified. It must be exercised so as not to violate the Fourteenth Amendment of the United States Constitution and so

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as to give equal protection to the property rights of the citizens. When not so used it is not valid. When a greater assessment is laid on one owner than on another arbitrarily and without regard to the benefits received it cannot stand. *Matter of City of New York*, 190 N. Y. 350.

The corporation counsel does not seriously dispute the illegality of requiring the property owners to pay these expenses but contends that it is no ground for denying this motion and that the property owners' remedy is by applying to have the costs retaxed. He claims that *Matter of Rosedale Avenue*, just cited, is authority for this proposition. It is not an authority for such a holding. There the court did say the costs should be retaxed but the proceeding had been amended already so that there was no other way in which to protect the property owner. Here the application is for the amendment and it should not be granted. The resolution of the board is illegal. It attempts to require the property owners to pay expenses which should and must be borne by the city. The court will not lend its aid to enforce such an inequitable and illegal act. If the board wishes to carry out the proposed amendment it must make provision for the payment by the city of the expenses to which reference has been made.

Motion denied.

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Matter of the Application of THOMAS FRANCIS MURPHY for a Peremptory Writ of Mandamus v. WILLIAM A. PRENDERGAST, as Comptroller of The City of New York.

(Supreme Court, Kings Special Term for Motions, March, 1917.)

Highways — awards for damages sustained by change of grade — interest — city of New York — damages — when writ of mandamus issues — Highway Law, § 59-a.

The provision of section 59-a of the Highway Law, that whenever awards are made for damages sustained by a change of grade "the award for the principal amount of damages sustained shall bear interest at the rate of six per cent. per annum from the time of the change of grade to the time of payment of the award," is of general application, and the receipt of the principal of an award for damages for the change of grade in front of petitioner's premises in the city of New York, and the giving of a receipt in full payment, without reserving the right to interest, is not a bar to a claim therefor, even though no demand for interest was made when the principal was received.

APPLICATION for a peremptory writ of mandamus.

Philip M. Bromberg, for petitioner.

Lamar Hardy, Corporation Counsel (Charles J. Nehrbas, of counsel), for respondent.

CROPSEY, J. The application is for the allowance and payment of interest upon an award for damages for the change of grade in front of petitioner's premises; interest is claimed from the time of the actual change of grade to the time of payment of the award. There is no issue of fact. In October, 1913, the physical work of grading Twenty-third avenue was com-

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menced and it was completed on May 30, 1914. On January 19, 1915, an award of $1,000 for petitioner's damage was confirmed, and this sum was paid on February 9, 1915. At the time petitioner signed a receipt which stated that it was "in full payment of above account," which set forth the award of $1,000 as damages to the property in question. The account also contained this statement, "all computations including interest verified $1,000."

The claim for interest is based on the provisions of chapter 701 of the Laws of 1910, an amendment of the Highway Law which added to it section 59-a. It provided that whenever awards are made for damages sustained by a change of grade, "the award for the principal amount of damages sustained shall bear interest at the rate of six per centum per annum from the time of the change of grade to the time of payment of the award." This statute is of general application and the provisions of the charter (§§ 951, 953) are not in conflict with it. That it is applicable to proceedings in the city of New York is conceded by the corporation counsel. The sole ground of opposition to this application is that the receipt of the principal of the award and the giving of a receipt in full payment, without reserving the right to the interest, bars the present claim. The petitioner does not contend that any demand for interest was made when the payment of the principal sum was received. It may be that he did not then know of the existence of the statute which made him entitled to the interest. But, be that as it may, it is immaterial to the proper disposition of this application.

The statute referred to (Laws of 1910, chap. 701) in effect makes the interest allowed a portion of the damages sustained by property owners in proceedings to change the grade of streets. It frequently happens,

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as in this instance, that the physical change of grade is brought about long before an award for the damages sustained is made. In the charter there was no provision by which the property owner could receive interest on the amount of the award from the time of the actual change of grade. His damage was sustained when the grade was changed, but frequently the award for the damage would not be made until long after. Evidently it was to overcome this injustice that the statute was passed whereby the property owner would receive interest on the amount of his damages from the time they were sustained to the time they were paid, regardless of when the award was made. The interest so awarded is in no sense as damages for the failure to pay. This distinction is of vital importance, as the cases point out.

It has been held that the receipt of a principal sum is a bar to a subsequent claim for interest, where interest is recoverable only as damages. *Jacot* v. *Emmett,* 11 Paige, 142, 146; *Hamilton* v. *Van Rensselaer,* 43 N. Y. 244, 246. It was suggested in the *Jacot* case that if there was a reservation of the claim for interest made at the time of receiving the principal sum the rule might be different. This suggestion, however, was subsequently overruled in *Cutter* v. *City of New York,* 92 N. Y. 166, where interest was demanded at the time and the principal was received under protest and with a saving of all the claimant's rights. If there is to be any rule barring claims for interest after the principal is paid, that laid down in the *Cutter* case would seem to be the logical one. The provision for interest in that case, however, was entirely different from that contained in the statute which is here applicable. There the court said (p. 170): " No other provision is made for the accruing or running of interest, and it was in

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no sense incident to or part of the original award. It is given as damages for non-payment or detention of the money awarded, and does not constitute a debt capable of a distinct claim." Citing cases. "It could only be recovered with the principal by action. Acceptance, therefore, of the sum awarded in full payment of the principal prevents an action for those damages. If the plaintiff meant to have demanded the interest, she ought not to have received the principal. In the face of that fact, protest against the refusal of the defendant to pay interest is of no importance." And again (p. 171): "There was no contract liability of the defendant for interest when the settlement was made. It could not become a debt against the defendant until judgment, and would then become due because allowed as damages." Still further, referring to the claim that because the right to interest had been asserted it could later be enforced, the court said (p. 172): "nor could she (plaintiffs' testator), by any avowed reservation, create a right which had no existence."

But in *Grote* v. *City of New York*, 190 N. Y. 235, the court allowed a recovery of interest after the principal had been paid, where at the time of such payment the claim for interest was reserved. This case apparently is in conflict with the *Cutter* case, and though that case was cited in the opinion in the Appellate Division (117 App. Div. 768) and in the respondent's brief in the Court of Appeals it is not referred to in the opinion in the latter court. The court contents itself by saying (p. 237): "The authorities to which the learned Appellate Division calls attention are clearly distinguishable." The distinguishing features of the *Cutter* and *Grote* cases do not appear to be so clear as the court says. In fact the cases seem to be the same, though the holdings are the opposite.

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Still later, in *Shepard* v. *City of New York*, 216 N. Y. 251, the court extended the rule further and allowed a recovery of interest after the principal had been paid, although no express reservation was made of it, the payment being received "on account." The opinion in this case states that it is distinguishable from the *Cutter* case. The differences are said to be that in the *Shepard* case the payment of the principal was not received as a payment in full and there was no suggestion that an additional payment would be made. The court said (p. 259): "there is no valid reason that I can perceive for holding that the mere acceptance of compensation which is unquestionably due to a public servant deprives him of all claim for interest by way of damages against the municipality which has unlawfully withheld it from him, when he expressly declares that he receives it only on account and that more is due him."

There would seem to be little difference between the *Shepard* case and the *Cutter* case. In the latter there was a receipt "in full," but it was given at the same time the claimant protested in writing that interest was due, and she reserved to herself all her rights. There is no apparent difference in principle between this situation and that in the *Shepard* case, where the payment was receipted for on account; and the above quotation from the *Shepard* case would seem to fit perfectly the facts in the *Cutter* case.

It is rather difficult to extract a rule from these several cases. It must be recognized that the principle laid down in the *Cutter* case, that interest could not be recovered where it arose merely as damages after the principal had been paid, is no longer the law. Wherever a claim for the interest is made at the time the principal is paid or the principal is not accepted in full payment, then it seems the interest may later

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be recovered. But if the recovery of the interest is not barred by reason of the failure to receive it when the principal is paid, there appears to be no reason in the rule which would permit it to be recovered later if the claim for it was reserved at the time, and to refuse a recovery of it when such claim was not reserved. If there is any right to recover the interest after the payment of the principal, there should be no need of reserving that right when the principal is paid; and if there is no right to the interest independent of the principal, the statement in the *Cutter* opinion, that no right could be created by an avowed reservation, seems to be logical.

In *Hobbs* v. *United States*, 19 U. S. C. C. 220, 228, it is stated: "When payment of the principal is accepted and no account is made of interest, it may well be presumed that it was not the intention to exact it. But such presumption is open to rebuttal. To this end, all the conversations and acts of the parties and the circumstances showing their intention ought to be considered." But why the question of intention is to control is not clear. If the claimant is entitled to interest, it should be recoverable at any time. If he is not entitled to it except it is received when the principal is paid, then no reservation of it can give him that right and the question of intention would not enter in.

An entirely different rule applies where the interest is a part of the compensation or award allowed or of the amount recovered. Then the failure to obtain the interest when the principal is paid makes no difference. *Devlin* v. *City of New York*, 131 N. Y. 123. While in that case the interest was claimed at the time the principal was paid, that is not essential to the right subsequently to recover it. Where interest forms a part of the claim and is not merely recov-

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erable as damages, a payment made on account of the whole sum due may be first applied to the payment of the interest and the balance to the payment of the principal. *People* v. *County of New York,* 5 Cow. 331, 337; *Merchants' Bank* v. *Freeman,* 15 Hun, 359; *Dean* v. *Williams,* 17 Mass. 417. This is true whether the interest is due under a contract or as damages. *Story* v. *Livingston,* 13 Pet. (U. S.) 359, 371; *Shepard* v. *City of N. Y.,* 216 N. Y. 251, 256.

In the present case the voucher referred to in the receipt shows that the payment of $1,000 was intended to include interest, for it reads: " all computations including interest verified." The fact that it did not include interest is conceded. The award was $1,000 without interest. So the payment that was made could probably be applied in the manner set forth in the authorities cited. The fact that the receipt states that the sum was " in full payment " means nothing, that is, it has no force or effect when the conceded facts show that it was not a correct statement. The payment made was not " in full." More than $1,000 was due the petitioner for his award and interest. The fact that he signed a receipt " in full " does not prevent him from recovering the balance that is actually due him. The language of such receipts is not conclusive, and they can be varied or contradicted. *Komp* v. *Raymond,* 175 N. Y. 102, 109, 110, and cases cited.

Such a receipt is not a bar, even though there was no mistake or fraud. *Ryan* v. *Ward,* 48 N. Y. 204; *Eames Vacuum Brake Co.* v. *Prosser,* 157 id. 289, 300. Cases analogous to the one at bar are those in which public employees who have received less compensation than was fixed by law recover the difference, although they have given receipts for full payment, and even though they had expressly agreed to serve for the

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lesser wage. *Clark* v. *State of New York*, 142 N. Y. 101, 103; *Kehn* v. *State of New York*, 93 id. 291; *Moore* v. *Board of Ed.*, 121 App. Div. 862, 866; affd., 195 N. Y. 614. A peremptory writ of mandamus must issue, with ten dollars costs.

Application granted, with costs.

ESTHER THOMAS, Plaintiff, *v.* ALEXANDER ZAHKA and WADIE NAJJAR, Defendants.

(Supreme Court, Kings Trial Term, March, 1917.)

Accord and satisfaction — what is an — payment — when agreement binding — contracts.

Mortgages — assignment of — satisfaction of — foreclosure of — what is a good consideration — evidence — tender — interest — election of remedies — parties — pleading.

The general rule that a mere partial payment of any indebtedness accepted in full settlement is not an accord and satisfaction is strictly limited to cases coming within it.

Where a creditor receives something else for value in addition to a part payment, an agreement that it extinguishes the debt is binding.

By an agreement synchronous with plaintiff's assignment of a $3,500 mortgage, as security for a loan of $2,000 made by defendants to a third party, defendants were declared to hold a prior interest in the mortgage to the extent of $2,000 with right to collect the whole principal and interest, being accountable to plaintiff for her share, and upon receiving payment to satisfy the mortgage. Both the assignment and the agreement were recorded and payment upon the mortgage by the owner of the property to defendants together with an assignment to them of a mortgage of $1,000 on other property totaled less than the amount defendants were entitled to receive, but they executed a satisfaction piece of the $3,500 mortgage which was not yet due and surrendered it with the accompanying bond. The indebtedness for which said mortgage was assigned as security was then past due and had never been paid. The amount of prior liens on said property covered by the

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$3,500 mortgage exceeded the value of the property at the time said mortgage was satisfied. At the time of the trial of this action by plaintiff to recover her share in the $3,500 bond and mortgage, the $1,000 mortgage which was subject to other liens had been cut off by a foreclosure and a deficiency judgment entered against the maker of the bond who was the same person who executed the $3,500 bond.

Held, that under the terms of the participation agreement defendants, the holders of said mortgage under an assignment absolute on its face, had the right to foreclose the mortgage or sue for the debt, and that in either event plaintiff was not a necessary party plaintiff.

That as to the debtor, the owner of the property, defendants were the owners of the mortgage with whom he could safely deal alone, and they having possession of the bond and mortgage any payment or settlement that bound them was also binding upon plaintiff.

That the acceptance of the $1,000 bond and mortgage in the circumstances was a good consideration to make effective the agreement for the discharge in full of the $3,500 bond and mortgage and was, in the absence of fraud, valid as an accord and satisfaction extinguishing the debt and discharging the debtor from all liability either on the bond or on the mortgage.

That while defendants could satisfy the mortgage if paid in full, or even when not so paid if the maker of the bond was insolvent and if it was done to prevent a foreclosure of a prior lien and was replaced by another mortgage on the same property and plaintiff's interest not prejudiced, defendants had no right to extinguish the debt and discharge the lien of the mortgage unless it was paid in full, and that so to do without plaintiff's consent was in violation of her rights and that as by defendants' act she was deprived of her share in the debt and had no way of enforcing it defendants were liable.

That an allegation of the complaint that the bond and the mortgage were for $3,500 was a sufficient allegation of their value and with a statement of plaintiff's interest to the extent of $1,500 was a statement of her damages and it was not necessary to plead the value of the bond and mortgage.

That as the solvency and the ability of the makers of the bond were presumed in the absence of proof to the contrary, and the amount unpaid on the bond being *prima facie* the value of the security although the mortgaged premises were not of that

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value, the fact that they were worth less than prior liens did not show that plaintiff was not damaged.

That there was a deficiency judgment against the debtor at the time of the trial, nearly two years after the satisfaction was given and the bond and mortgage surrendered, was immaterial, the only question being whether the debtor was solvent at the time the satisfaction was given.

That it was not necessary for plaintiff to tender to defendants the amount due them from the third party, to secure which the assignment of the bond and mortgage had been made, as the value of the security was greater than the debt, and that plaintiff by defendants' act was injured to the extent of the balance of such value over the debt.

That defendants have not received the amount of their interest in the bond and mortgage cannot be considered in determining the questions involved.

That admissions in the answer showing that defendants had received more than their interest in the bond and mortgage while not binding and conclusive could properly be used as evidence against them.

That after plaintiff learned of the satisfaction of the mortgage she filed a notice of claim of her interest in it, asserting that it still existed, was not binding upon her as an election of remedies and did not affect her rights to any legal remedy which she possessed.

ACTION to recover plaintiff's share in a certain bond and mortgage after same has been satisfied.

Frank E. Johnson, Jr., for plaintiff.

London & Davis, for defendant Zahka.

Adolphus D. Pape, for defendant Najjar.

CROPSEY, J. This case was tried before the court, a jury being waived. There is no disputed question of fact, all the facts being conceded. Briefly, they are these: The plaintiff owned a mortgage on real property for $3,500, which she assigned to the defendants as security for a loan of $2,000, which they made to a party named Plaisantin; the assignment on its face

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was absolute; at the time it was given a participation agreement in the usual title company form was executed, by which the defendants were declared to hold a prior interest in the mortgage to the extent of $2,000 and the plaintiff a subordinate interest to the extent of the balance, the defendants having the right to collect the whole principal and interest, being accountable to plaintiff for her share and upon receiving payment to satisfy the mortgage, the defendants having "all the rights of any holders of said bond and mortgage;" the assignment and participation agreement were recorded; the owners of the property covered by the mortgage paid something on account to the defendants, and later made another payment and assigned to the defendants a bond and mortgage for $1,000 on other property; the amounts so paid together with the face value of the $1,000 bond and mortgage totalled less than $2,000 with interest, which defendants were entitled to receive; at the time of receiving the cash payment and the assignment of the $1,000 mortgage, the defendants executed a satisfaction which was filed, and surrendered the $3,500 bond and mortgage; it was the intention of the defendants and the owner of the property that the payment of the money and the assignment of the $1,000 mortgage should be in full payment of the $3,500 bond and mortgage; at that time the $3,500 bond and mortgage were not due; Plaisantin's indebtedness was then past due and has never been paid; there were prior liens on the property covered by the $3,500 mortgage, which in amount exceeded the value of the property at the time that mortgage was satisfied; the $1,000 mortgage also was subject to other liens and at the time of the trial it had been cut off by a foreclosure and a deficiency judgment entered against the maker of the bond; the $1,000 bond was executed by the same person as the

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$3,500 bond; the plaintiff has never received her share in the $3,500 bond and mortgage, and brings this action to recover it.

Under the terms of the participation agreement, the defendants had the right to bring a foreclosure action or to sue for the debt, and the plaintiff was not a necessary party plaintiff. As to the debtor, the owner of the property, the defendants were the owners of the bond and mortgage, and the debtor could safely deal with them alone, any payment or settlement that bound the defendants binding also the plaintiff. *Corporate Investing Co.* v. *Gracehull Realty Co.*, 157 App. Div. 259, 260, 261 (construing almost identical agreement); *Lowenfeld* v. *Wimpie*, 139 id. 617, 620. In the latter case (p. 621) it was held that under such a participation agreement the defendants could satisfy the mortgage and discharge the indebtedness without the plaintiff's consent and without receiving payment of it, and that the owner of the property would be protected.

The general rule that a mere partial payment of an indebtedness, though accepted in settlement of it, is not an accord and satisfaction, is not favored by the courts and it is strictly limited to cases coming within it. *Jackson* v. *Volkening*, 81 App. Div. 36, 43, 44, and cases cited. So when in addition to a part payment of the debt the creditor receives something else of value, an agreement that it extinguishes the debt is binding. 1 Corpus Juris, 544; *Jaffray* v. *Davis*, 124 N. Y. 164, and cases cited; Chase's Blackstone (3d ed.), 622. Under these authorities, the acceptance by the defendants of the $1,000 bond and mortgage from the debtor was a good consideration to make effective the agreement that it discharged in full the $3,500 indebtedness.

Again, the $3,500 mortgage was not due at the time

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it was satisfied, so it could be satisfied and the debt extinguished for less than its face value. 1 Corpus Juris, 544; *Bandman* v. *Finn*, 185 N. Y. 508, 512, and cases cited. In *Hutchings* v. *Munger*, 41 N. Y. 155, the debt was due and that was given (p. 158) as a reason why part payment could not satisfy.

The surrender of the $3,500 bond and mortgage, with the intent that the debt be discharged, was effective in the absence of fraud or mistake. *Larkin* v. *Hardenbrook*, 90 N. Y. 332, 334; *Babcock* v. *Bonnell*, 80 id. 244, 248.

The debtor is protected in making payments to the defendants and in settling the claim with them. They had possession of the bond and mortgage and also an absolute assignment of them, and the debtor was justified in dealing with them. *Crane* v. *Greunewald*, 120 N. Y. 274. The cases (*Waterman* v. *Webster*, 108 N. Y. 157; *Macpherson* v. *Rollins*, 107 id. 316, and *Luce* v. *Gray*, 92 Hun, 599) cited by defendants do not support their contention. In each the mortgage on its face showed that others than the person executing the satisfaction piece were part owners of it. Here the defendants appeared to be the sole owners, on the face of the assignment. The only paper which showed the plaintiff's interest was the participation agreement, and, while that was recorded, it was not notice to the debtor. The Recording Act (Real Prop. Law, § 291) makes the record of a conveyance (and a satisfaction is a conveyance, Real Prop. Law, § 240; *Bacon* v. *Van Schoonhoven*, 87 N. Y. 446; *Assets Realization Co.* v. *Clark*, 205 id. 105, 119) notice only to subsequent purchasers and mortgagees. The debtor was neither. A person taking an assignment of a mortgage, or an interest in it, must give actual notice to the debtor, otherwise the latter may treat the former holder of the mortgage as its owner, especially if he

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retains possession of the bond and mortgage, and payments made to him will be deemed proper; constructice notice of the assignment by merely recording it is not sufficient, the debtor is not bound by it. *Ely* v. *Scofield,* 35 Barb. 330; *James* v. *Morey,* 2 Cow. 246, 288; *Brewster* v. *Carnes,* 103 N. Y. 556; *Mueller* v. *Goerlitz,* 53 Misc. Rep. 53.

From what has been said, it follows that the settlement made by the defendants with the debtor was a valid accord and satisfaction, that it was binding on the plaintiff, that it extinguished the debt and discharged the debtor from all liability on either the bond or the mortgage, and hence that the plaintiff cannot sue to foreclose her interest in the mortgage or to recover her share in the bond. The defendants had the right to foreclose the mortgage but, under the terms of the agreement, only upon giving notice to the plaintiff; they could also satisfy the mortgage, if it was paid in full, or even when not paid, if the maker of the bond was insolvent and if it was done to prevent a foreclosure of a prior lien, and was replaced by another mortgage on the same property and plaintiff's interests were not prejudiced. *Lowenfeld* v. *Wimpie,* 139 App. Div. 617. But they had no right to extinguish the debt and discharge the lien of the mortgage under any other circumstances, unless they received full payment. To do so without the consent of the plaintiff was in violation of her rights. The defendants' act has deprived the plaintiff of her share in the debt. She now has no way of enforcing it. The defendants are liable. *Dyckman* v. *Valiente,* 42 N. Y. 549, 560, 561; *Osborn* v. *Schenck,* 83 id. 201, 204; *Gates* v. *Bowers,* 169 id. 14, 17.

The defendants assert that the complaint does not state a cause of action. They say the value of the bond and mortgage is not pleaded. It is. The com-

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plaint states that the bond and mortgage were for $3,500, and that is a sufficient allegation of their value, for they are presumed to be worth their face unless the contrary is shown. *Booth* v. *Powers*, 56 N. Y. 22, 27; *Thayer* v. *Manley*, 73 id. 305, 308; *Griggs* v. *Day*, 136 id. 152, 161; *Blumenthal* v. *Lewy*, 82 App. Div. 535, 537; *Deri* v. *Union Bank*, 65 Misc. Rep. 531, 536. Thus a statement of the face amount with a showing of the extent of the plaintiff's interest was a statement of her damages. But it was not necessary to plead the value of the bond and mortgage. *Gleason* v. *Morrison*, 20 Misc. Rep. 320, 324. The complaint shows that plaintiff claims to be damaged to the extent of $1,500, and that was all sufficient.

The defendants further claim that the complaint is defective because it does not show that plaintiff's interest in the bond and mortgage was extinguished. The participation agreement is set forth in full in the complaint, and the fact that the defendants had for value before its due date surrendered the bond and mortgage and given a satisfaction which had been filed is also pleaded. Upon these facts the defendants had no right, as against the plaintiff, to discharge the debt for less than its face value and thus prejudice her, although the debtor was justified and protected in dealing with the defendants. This has been shown in the cases already cited. On the trial it was conceded that the defendants and the debtor intended the settlement made to be in extinguishment of the debt. If it could be said that the complaint did not in effect contain such an allegation and that it was essential, the plaintiff on the trial moved to amend to conform to the proof, and that motion is now granted.

The further claim is made that the plaintiff was not damaged. Defendants point to the fact that the property upon which the mortgage in question was a lien

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was worth less, at the time the mortgage was satisfied, than the total amount of the prior liens on it. But there is no proof of the insolvency of the makers of the bond at that time. Their solvency and ability to pay are presumed in the absence of proof to the contrary (*Potter* v. *Merchants' Bank,* 28 N. Y. 641, 655), and the amount unpaid on the bond is *prima facie* the value of the security, although the mortgaged premises are not of that value. *Barber* v. *Hathaway,* 47 App. Div. 165; affd., 169 N. Y. 575.

That there was a deficiency judgment against the debtor at the time of the trial, over twenty months after the satisfaction was given and the bond and mortgage surrendered, does not affect the situation. There is nothing to show that the debtor was not solvent at the time in question, and that is the only concern. Nor does it matter whether the bond and mortgage, taken by the defendants when they extinguished the original debt, were paid. Defendants had no right to accept in payment of the $3,500 bond and mortgage anything but money, at least not beyond the amount of their interest in it, that is, $2,000. They could not give away the interest the plaintiff had in it, nor could they exchange that interest for some other security. That they did at their peril and they became liable to the plaintiff for her share. *Knope* v. *Nunn,* 151 N. Y. 506.

The case of *Lowenfeld* v. *Wimpie,* 139 App. Div. 617, already cited, does not authorize what the defendants here did. There the court upheld the satisfaction of a mortgage by the person holding the superior interest under a participation agreement, without receiving payment, but only because it was replaced by another mortgage on the same property, and was done to prevent a foreclosure of prior liens and because the debtor (the maker of the bond) was insolvent (p. 619).

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There the person holding the subordinate interest lost no right. His bond was worthless and he was in no way damaged. On the contrary, the arrangement was to prevent a foreclosure of a prior lien, which was in his interest. Here the plaintiff has lost rights, the right to enforce the bond, which was not worthless, and the right to foreclose the mortgage, which was valuable, notwithstanding the conceded fact that there was no equity in the property. The mortgage the defendants took in payment was on different property. It was not taken to prevent a foreclosure. The plaintiff was damaged. The arrangement made by the defendants with the debtor was not in her interest. Defendants were concerned only about their own interests, and they absolutely cut off every claim the plaintiff had. She lost much by the defendants' act and gained nothing.

It was not necessary for the plaintiff to tender to defendants the amount due to them from Plaisantin; she was not their debtor, and, even if she were, there would be no such requirement, "as the value of the security was greater than the debt, and by the defendants' act she was injured to the extent of the balance of the value over and above the debt." *Barber* v. *Hathaway,* 47 App. Div. 165, 169; affd., 169 N. Y. 575.

The defendants' brief emphasizes the claim that they have not received even the amount of their interest in the bond and mortgage and urges that it would be unfair to compel them to pay plaintiff's claim. This cannot be considered in determining the law questions here involved. The situation in which the defendants find themselves was one of their own choosing and they must bear the consequences of their act. But it does not appear that the defendants are in such a situation as they claim. They admit having received at different times $383 and $730, in cash, also

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the $1,000 mortgage, and their answer alleges a sale of the $3,500 bond and mortgage at public auction which realized an additional $1,500. Thus, even excluding the $1,000 mortgage which they say had no value, they seem to have received $2,613. The statement referred to in the answer can properly be used as evidence against the defendants (*Talbot* v. *Laubheim,* 188 N. Y. 421, 425, and cases cited) though perhaps it would not be binding and conclusive, and might be controverted or explained, as it is but a part of the allegations of a defense and so could not be treated the same as the whole allegation in a pleading would be treated. *Young* v. *Katz,* 22 App. Div. 542.

After the plaintiff learned that the defendants had satisfied the mortgage, she filed in the register's office a notice of claim of her $1,500 interest in it, asserting that it still existed. This the defendants claim was an election of remedies by her which prevents now the maintenance of this action. But the filing of that notice was futile. She could not enforce her claim either to a bond or mortgage, as has been shown. "Any step, or action, taken by her, which was fruitless, because proceeding upon a misconception of the rights which the law gave her, left her unaffected as to any legal remedy which she did possess." *Henry* v. *Herrington,* 193 N. Y. 218, 223. Besides, the defense that plaintiff has made an election must be pleaded like every other matter in bar. *Roberge* v. *Winne,* 144 N. Y. 709, 712. There is no such plea here. The plaintiff is entitled to judgment.

Judgment for plaintiff.

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SARAH A. MOORE, ELLA S. WHITON, FREDERICK W. DAUCHY, AGNES MAXWELL, MARY MAXWELL, ADA S. MAXWELL and SARAH A. MAXWELL, Plaintiffs, *v.* GEORGE M. HENDERSON, Defendant.

(Supreme Court, Kings Special Term, March, 1917.)

Deeds — cloud on title — removal of — restrictive covenants in deeds — equity — actions — mortgages — Code Civ. Pro. §§ 1638, 1639.

Restrictive covenants in a deed of conveyance created for the benefit of property retained by the grantor are enforcible only by him or his grantees who owned the property benefited by the covenant against the owners of the property burdened thereby.

Restrictive covenants entered into by various grantees pursuant to a general plan, on the theory of mutuality, are enforcible by the several grantees each against the other.

S, the owner of a plot of land, subdivided the same into lots and in every deed affecting an interior lot, described by metes and bounds, the grantee covenanted that no building erected thereon should be situated less than twenty feet from the street; that no dwelling house should be erected on the lot of a value less than $5,000; that but one building should be erected on the lot and that no building of any kind should be erected thereon except a private dwelling, and each deed expressly stated the covenants should run with the land. Both of the corner lots were conveyed by S free and clear of any such restrictions and about two years after the erection of an apartment house on one of them, without objection from those who naturally would be most concerned, the grantee of the other corner lot, together with owners of certain of the interior lots, brought an action under sections 1638, 1639 of the Code of Civil Procedure to have the restrictive covenants canceled and removed upon the theory that plaintiffs and their predecessors in title were deceived into believing that S intended to restrict both the inside and corner lots. *Held*, that as it appeared that all that S did was to restrict the inside lots for the benefit of the remainder of his property the restrictive covenants were valid and binding and that the relief asked could not be granted as against the protest and objection of the holder of a mortgage on said apartment house.

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ACTION in equity to remove a cloud on title.

Frederic N. Gilbert for plaintiffs.

George C. Case for defendants.

MANNING, J. This action is one in equity and was called for trial at the June, 1916, term, being No. 3264 on the calendar. The parties then stipulated that the case might be marked for submission and that they would take the proofs at their own convenience. The record is now complete and under date of February 17, 1917, it is submitted by the parties with a consent that each and all of the objections stated upon the record are to be considered withdrawn, and that the evidence produced by each side may be considered by the court without passing upon any of such objections, except the objection regarding the admissibility of a resolution of the board of estimate and apportionment, adopted July 25, 1916, and the acts of the legislature authorizing such resolution.

The plaintiffs bring the action pursuant to sections 1638 and 1639 of the Code of Civil Procedure for the purpose of removing what they assert is a cloud upon the title to certain real property owned by them.

The controversy arises out of and concerns certain restrictive covenants affecting the plaintiffs' lands, which were heretofore, and in the month of April, 1893, conveyed to one John E. Searles, who thereafter imposed the restrictions, the validity of which is now the subject of judicial inquiry in this law suit.

The title of Searles became vested in him by deeds from two grantors; namely, Henrietta Douglas, who on April 20, 1893, conveyed to him the plot of land on the north side of Newkirk avenue, being now known as lots 1 to 23 both inclusive, and Charles E. Crehan,

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who on April 26, 1893, conveyed to him the plot on the south side of Newkirk avenue, now known as lots 24 to 46 both inclusive. These numbers are taken from a map of the whole property which Searles caused to be made, but this map appears not to have been filed in the engineer's office in Kings county until December 3, 1914, over twenty-one years after Searles had acquired the title, and in all the sales made by Searles no reference is made to this map, it affirmatively appearing that the various lots sold by him were described by metes and bounds and not by lot numbers.

Searles undoubtedly purchased the property for investment and development purposes, and shortly after he became seized of the fee he divided the plot into sections or blocks and then subdivided each block into lots undoubtedly with care and foresight, and as the blocks were not exactly square in area, and being obliged to allow for certain intersecting streets, his plan resulted in producing forty-six lots, the interior ones twenty-five feet in width, by the depth of the property, which may be termed regular or inside lots, and certain corner lots which are irregular and unequal in size and character. He employed real estate agents to sell the property and the map he concededly had prepared was used and referred to in making some of the various sales. This map contains what is no doubt a carefully plotted survey of the entire tract, and upon the back thereof is printed the following: "The choicest building sites in Flatbush, with water, sewer and gas, 35 minutes from the Bridge by Flatbush Avenue Electric Cars. Large shade trees on every lot. Carefully Restricted."

The first sales made by Searles embraced two inside lots numbered 14 and 15, and were sold free of any restrictions, save a general nuisance clause, which was on a portion of the property when Searles bought it.

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These two lots were sold on September 14, 1893, and it appears from the evidence that the sale was merely made to stimulate the enterprise — I take it that the financial part of the transaction was really taken care of by Searles himself. Searles evidently had in mind, so far as the interior lots were concerned, that he would make a form of restriction which would be uniform and beneficial, not only to the interior plots themselves, but in the nature of things would help his corner lots, and so, the proof shows that in every deed, and in fact in the contracts of sale, which he thereafter made affecting any interior lot, there were inserted the following restrictive covenants:

"That no building to be erected on said plot of ground shall be situated less than twenty feet from Newkirk Avenue;

"That no dwelling house shall be erected on said plot of ground of a value less than Five thousand dollars;

"That but one building shall be erected on said plot, it being understood, however, that this covenant shall not interfere with reconstruction in case of destruction by fire;

"That no building of any kind shall be erected except a private dwelling, as above covenanted, and a private stable; said stable to be situated on the northerly (or southerly, as the case might be) boundary line of said plot above described. This covenant to be construed as a covenant running with the land," which are known as the Searles covenants, and the various purchasers, including the plaintiffs, took their deeds with full knowledge of the fact that such restrictions were upon the lands purchased by them.

Searles never placed or created any restrictions upon the corner lots and the same are now, and always have been, free and clear of any such restrictions. The

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plaintiff Sarah A. Moore purchased one of the corner lots over twelve years ago, namely, on April 29, 1904, and must then have had personal knowledge that the corner lots were not restricted, for the deed to her does not contain the Searles restrictions, and the proof further shows that nearly sixteen years have elapsed since Searles made his transfer of the corner lots free from any restrictions, and nearly two years have elapsed since the erection of an apartment house on lot No. 1 without any objection being made by those who would naturally be most concerned.

The plaintiffs now seek to have the so-called Searles restrictions canceled and removed from their property upon the theory that they and their predecessors in title were deceived into believing that Searles intended to restrict the whole property, inside lots and corner lots too. They contend that the covenants should be discharged for the reason that the oral statements and the representations on the map established this restricted community which has been violated by owners of the corner plots and hence the neighborhood has changed. They attempt to support this contention on the theory that Searles had in mind a general building scheme in regard to the development of his property shown on the map, and to make out of the same a section of single family detached houses costing not less than $5,000 each, set back twenty feet from Newkirk avenue. The further assertion is made that there has been a complete change in the character of the property on the Searles map, surrounding the properties of the plaintiffs, from a residential section of single family dwellings to that of an apartment house section, and that the object of the restrictions which the plaintiffs covenanted to observe has ceased to exist.

The defendant maintains and contends that the

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restrictive covenants in question are valid and existing, and that restrictions could not be placed upon the corner property by oral representations. Further, that the Searles covenants were made for the benefit of the corner plots which he retained, and that plaintiffs took title to their property with knowledge and notice of the conditions and cannot now ask to be relieved. And, lastly, that there has been no change in the character of the locality that would warrant a court of equity decreeing that the covenants should be removed.

Many of the property owners and holders of interests in the restricted plot have either consented to the cancellation of the restrictions or permitted judgments to be entered against them canceling the same, but the defendant herein has not consented and has not been a party to any action or judgment, and, hence, is not bound thereby.

On May 12, 1899, lot No. 1 was sold to Benjamin F. Stephens, and did not contain the Searles covenants. It was subsequently on June 1, 1910, conveyed by Annie W. Stephens as executrix of the last will and testament of Benjamin F. Stephens, deceased, to Wilmot Y. Hallock, and thereafter conveyed by Hallock to George C. Case, by deed, dated June 4, 1910, and then conveyed by Case to Frank M. McCurdy, Company, Inc., on February 16, 1914, and thereafter by the McCurdy Company to the Louisville Realty Company on March 16, 1914. The Louisville Realty Company executed a mortgage for $65,000 to the Lawyers Mortgage Company, which was subsequently assigned to the Brooklyn Trust Company, and a second mortgage for $23,000 to the Frank M. McCurdy Company, Inc., which was thereafter assigned to George C. Case, and by him assigned to the defendant, George M. Henderson, and his interest in the property is now repre-

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sented by this mortgage. He argues that the effect of a judgment or decree canceling the restrictions upon the interior lots would result in these lots being placed on the market and made available for the erection of apartment houses, and as a consequence the building upon which he now has a second mortgage would be depreciated in value in the event of the erection of other apartment houses, and as a natural result his security must of necessity become impaired, but he is willing to consent to a waiver of the restrictions if the plaintiffs will indemnify him against any loss he may sustain.

I am inclined to the belief that the position assumed by the defendant concerning the validity of the Searles covenants is the correct one, and that the plaintiffs have not sustained the burden essential to enable a court of equity to cancel the said restrictions.

It is true that the record contains some oral declarations tending to support the plaintiffs' theory, but the picture presented by the surrounding circumstances and the facts disclosed by the map exhibited to purchasers of the interior lots are against the probability of such oral representations having ever been made in the language claimed. It conclusively appears from an inspection of the map in question that the size of the corner lots, and the irregularity of their formation and dimensions, render them entirely unsuitable for single detached family dwellings. On the contrary, it is apparent that they are more suitable and better adapted to other purposes. For example looking at the two corner lots on Ocean avenue, numbered 1 and 46 on the map, if a single detached dwelling were built on each of these lots fronting on Newkirk avenue, and the owner should erect a stable on the boundary line as permitted by the fourth of the "Searles covenants," such stable

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would be parallel with or fronting on Ocean avenue, and for all time to come would be in full view of the passers-by on what has become the finest residential street in Flatbush. The same would be true of a single dwelling facing on Newkirk avenue, erected on the other corner lots, and thus, in each instance, the stable would be in full view of, and but a few feet from, the side street. It is scarcely conceivable that such a plan of improvement was ever contemplated by a shrewd and far-seeing business man such as John F. Searles is admitted to have been, and the probability of the result, so plainly apparent, more than offsets the oral testimony as to these representations. Further than this there is direct evidence in the case that Searles declared that the covenants were for the benefit of the corner lots which he was not then selling.

It seems to me that these covenants fall within the class where the courts have held that when the covenant is intentionally exacted by the grantor from a grantee "presumptively or actually, for the benefit and protection of contiguous or neighboring lands which the former retains" such a covenant runs with the land (in the case at bar it is so expressed); and is enforcible by the grantor or his assigns in favor of the property benefited by the covenant and against the property burdened by it. *Francis* v. *Ziering,* 128 App. Div. 253; *Walker* v. *McNulty,* 19 Misc. Rep. 701; *Atlantic Dock Co.* v. *Leavitt,* 54 N. Y. 35, 42.

Such a restrictive covenant need not be made pursuant to or in furtherance of any general plan or scheme adopted by the owner, but it may be required from the grantee with the intention and for the purpose of protecting the land retained by the grantor. *Smith* v. *Graham,* 161 App. Div. 803, 805; affd., 217 N. Y. 655, on opinion below. See, also, *Korn* v. *Campbell,* 192 N. Y. 490, 495; *Silberman* v. *Uhrlaub,* 116

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App. Div. 869, 872; *Phoenix Co.* v. *Continental Ins. Co.*, 87 N. Y. 400, 408.

As these decisions are read it is apparent that the difference between restrictive covenants created for the benefit of property retained by the grantor and restrictive covenants entered into by various grantees, pursuant to a general plan or scheme, is this, the former are enforcible only by the grantor, or his grantees, who own the property benefited by the covenant, against the owners of the property burdened by the covenant; the latter are, on the theory of mutuality, enforcible by the several grantees, each against the other. *Korn* v. *Campbell,* 192 N. Y. 490, 495.

In the case at bar, the covenants are not sought to be enforced by the grantees of the interior lots, and hence it is not necessary, therefore, to determine whether or not a clearly defined scheme or plan of improvement existed, which was disclosed to intending and prospective purchasers. It might be possible, however, from the evidence in this case, to find a general scheme of improvement, but, if so found, it would involve the restricting of interior lots to single detached dwellings.

There is no proof here that Searles ever intended to restrict all the lots — in fact, proof is to the contrary. All that he did was to restrict inside lots and this was evidently done for the benefit of the remainder of his property, and, hence, I am of the opinion that the restrictions are valid and binding and cannot be canceled as against the protest of the defendant who objects to such cancellation. Judgment is therefore rendered for the defendant.

Judgment for defendant.

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Matter of the Application of AUGUST MERRILL to Strike from the List or Registry of Voters of the Third Election District of the Eleventh Ward of the City of Utica the Names of JOSEPH E. BRIDGEMAN and Seventeen Others.

(Supreme Court, Oneida Special Term, March, 1917.)

Elections — what is a voting residence — when application to strike names from registry list denied.

For the purpose of voting, the "Home for Aged Men and Couples" in the city of Utica, N. Y. is the residence of its members, and an application to strike the names of male members from the registry list in the election district where the "Home" is located and from which they have voted for years will be denied.

APPLICATION to strike names from voting registry list.

Clarence E. Williams, Jr., for motion.

Theodore L. Cross, opposed.

DEVENDORF, J. Section 3 of article II of the Constitution of the state of New York provides that: "For the purpose of voting, no person shall be deemed to have gained or lost a residence * * * while kept at any * * * institution wholly or partly supported at public expense or by charity." This is supplemented by section 163 of the Election Law, known as chapter 22 of the Laws of 1909, which is identical with the language above quoted, adding, however, a clause as to registration.

It is claimed on the part of the petitioner that these respondents are all inmates of the Home for Aged Men and Couples in the city of Utica and consequently

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come within the inhibition of both the Constitution and the statute above stated, and that they neither gain a residence there nor lose it elsewhere and are not entitled to register and vote in the election district where the home is located.

As early as 1882 twenty-eight ladies of the city of Utica and its vicinity associated themselves together to form this corporation. The certificate subscribed by them stated that the object and business of such association is the protection, assistance and support, wholly or in part, of respectable, aged, indigent or infirm men who are unable to support themselves without assistance. The constitution and by-laws of the institution provide that applicants for admission shall be of good character and must pay $300, and in addition thereto convey and transfer to the corporation, by written instrument, all property, both real and personal, owned by him at that time and also any and all property of every description to which he may thereafter become entitled while a beneficiary of said home.

In case of aged couples, they were admitted under the same terms and regulations on payment of $600. Applicants are to be on probation three months and if rejected the money is refunded (less a certain charge for maintenance). At the expiration of said three months the applicant is considered an inmate of the home, *with its privileges for life.* The written agreement and conveyance is then executed and the relative rights and obligations of the parties fixed. In case of violation of the contract by the inmate he may lose the benefits of the home, together with the money and property transferred.

I have been unable to find any decision based upon facts such as are presented here and none has been pointed out to me. I think *Matter of Batterman,* 14

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Misc. Rep. 213, cited by the petitioner, is as near the line as any, yet, in view of all the facts disclosed on this motion, it can fairly be distinguished. The case of *Silvey* v. *Lindsay*, 107 N. Y. 55, was a soldier's home case and not applicable to govern the questions involved here. *Matter of Barry*, 164 N. Y. 18; *Matter of Goodman*, 146 id. 284; *Matter of Garvey*, 147 id. 117, were student cases.

The members of this home procured their right of domicile there by purchase and contract. The least sum that will buy it is $300, and together with that amount must go all other property then owned, or subsequently acquired. In this instance members have paid as high as $1,100. The applicant must be upwards of sixty-five years of age when he enters the institution and it can hardly be said that men of that age, paying $600, $800, $1,100, and as much as $1,400, or even $300, could in no event obtain a voting residence there. Neither the Constitution nor the Election Law forbids an inmate of an institution supported wholly or in part by charity having such right, but there is no presumption in favor of it(in fact the presumption is the other way). The intention to change is not alone sufficient, but it must appear by acts independent of his being but an object of charity.

The Constitution also provides that, for the purpose of voting, no person shall be deemed to have gained or lost a residence while a student of any seminary of learning, yet it has been held that a student may acquire residence at the place where the seminary is located. *Matter of Ward*, 29 Abb. N. C. 187. See, also, *Matter of Garvey*, 84 Hun, 613; 147 N. Y. 117. Ex-Chief Judge Andrews said at the Constitutional Convention of 1867, when the meaning of this phrase was under consideration: "If a student had no other residence than where he is attending college, and if

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the intention was with him to remain in that place, although he might be a student there, he would have the right, notwithstanding the insertion of this clause, to vote there." Also said Justice Rumsey: "He may, if he actually has the intention to change his residence, become a resident of the place where he is studying as fairly as if he went to any other place, and in that case he acquired the right to vote."

A person of full age and not under legal restraint has, under the laws of this state, the absolute right to change his residence or domicile when and to what place he will.

The applicant for admission to this home must have been a resident of Oneida county for fifteen years after attaining his majority, or eight years immediately preceding the date of application (as provided by the constitution of the home). Presumably he had the best interest of the community in mind and for years has been a qualified voter of the district. His individual rights are vested in his citizenship and he should not be barred from exercising his right of franchise in the township or city ward where he has purchased a right of domicile, for a valuable consideration, and intends in good faith to reside the remaining days of his life. The home is permanently located. It has sufficient income for maintenance and is now wholly independent of any gift or voluntary contribution of outsiders. Not a dollar of public funds is now, or ever has been, received by it. It does not receive any support or money for maintenance from the state, or any political division thereof, but is sustained entirely by the joint funds and property of the inmates and gifts heretofore made by kind and charitably inclined people. It is not in any manner a public or state institution, or subject to the control of the state board of charities.

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These men paid a substantial sum of money for certain rights and transferred all their property, both real and personal, to the institution, and have abandoned their former homes, doing so with the intention of never returning. They severed all property and residential relations with their previous place of abode; their residence there terminated and a new and permanent one was established elsewhere by purchase.

From these facts and their declaration of intention from year to year a jury could infer and the court find, as a matter of fact, that they intended to and had acquired a permanent home and a legal voting residence in this place, and lost it in the former. They are entitled to vote somewhere and, as substantially conceded on the argument and as I understand the fact, have been voting from their present residence for years. That right is now challenged. They may well hesitate to swear to a residence at the place from whence they came, possibly years ago. All their property is elsewhere and their financial and domestic interests are at their present domicile. To go back to the abandoned neighborhood and declare a voting right there would be contrary to previous acts and expressed intention on their part. Therefore, to grant this application would deprive these men of one of the most important privileges of citizenship and take from them that to which they are justly and legally entitled.

In *Matter of Goodman,* 146 N. Y. 289, Judge Finch said, in reference to striking names from the registry: "This provision applies, not to a case of doubt, not to one resting in some uncertainty or dependent upon inferences of a debatable character, but to a case in which the facts show affirmatively that the intending voter is not and cannot become qualified. If there is dispute about the facts or ground for differing inferences, the judge should not intervene."

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I am inclined to think there may be doubt whether this is what can be said to be a charitable institution so far as the status of these respondents is concerned. They have vested rights and interests here, granted to them for a valuable consideration, and consequent privileges and equities which the courts would protect and enforce. A business venture could be conducted upon almost exactly the situation which we have here. Assume that the age limit of the applicants is increased, as well as the cash payments required, and men sought whose chances of future acquirement of wealth were good, and we can easily see how an enterprise of that kind might yield a profit to the management. Regardless of that question, however, I have come to the conclusion, for the reasons stated, that the respondents possess a voting residence where they have claimed it in the city of Utica.

The motion is therefore denied, with costs.

Motion denied, with costs.

HORACE T. MANN, Plaintiff, *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.

(Supreme Court, Onondaga Special Term, February, 1917.)

Jurisdiction — inspection of testimony given before grand jury — actions — criminal law.

A motion for the inspection of the testimony given by a witness before the grand jury, and for a copy thereof for use upon the trial of a civil action, will be denied on the ground that the court has no jurisdiction to grant it.

MOTION to inspect transcript of evidence given before the grand jury of Oswego county.

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Thomson & Byrne, for motion.

F. D. Culkin, District Attorney of Oswego county, opposed.

HUBBS, J. This is an application made to the court by the defendant for permission to inspect the transcript of the evidence given by John Casey before the grand jury of Oswego county in the case of *People* v. *Campbell*. The district attorney of Oswego county appeared upon the hearing and stated that all criminal proceedings in the case of *People* v. *Campbell* had been closed and that a disclosure of the evidence given by Casey would not affect any pending criminal proceeding.

The application is based on section 952-t of the Code of Criminal Procedure, which provides that the stenographer for the grand jury shall keep secret all testimony introduced before the grand jury, except that he may furnish the district attorney with a copy thereof; that as to all other persons it shall be kept secret "except upon the written order of the court duly made after hearing the said district attorney."

This section was derived from Laws of 1885, chapter 348, section 5; amended by Laws of 1899, chapter 516, section 3, and Laws of 1907, chapter 587, section 5.

My attention has not been called to any case where an application has been made for a copy of the evidence of a witness before a grand jury, for use upon the trial of a civil action. All applications under this section, as far as I have been informed, have been made in a criminal case pending before the court. If the court has power under this section to allow an inspection of the evidence given before a grand jury and the furnishing of a copy thereof by the stenographer for use upon the trial of a civil action, it is a power

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that has not been understood or acted upon. At common law no record of the proceedings before a grand jury was preserved. *Ex parte Taylor,* 5 Cow. 56. Later the statute provided that a grand jury might appoint one of its members as clerk. In *People* v. *Steinhardt,* 47 Misc. Rep. 255, Justice Kenefick said that he had found no reported case where an inspection of grand jury minutes had been allowed prior to the statute of 1885. Since that time the courts have, in certain cases, permitted an inspection by the defendant for the purpose of enabling him to move to set aside the indictment.

The reasons for keeping grand jury minutes secret are too well understood to require stating. The courts should not lightly do anything which will take away the protection thrown around a witness before a grand jury. All persons should be encouraged to appear freely before grand juries and offer their testimony, with assurance that it will not lightly be made public.

All motions under section 952-t of the Code of Criminal Procedure are addressed to the discretion of the court. I believe this is a case where a court might very properly grant the order if it has jurisdiction to do so. This motion is, therefore, denied, upon the ground that the court has no jurisdiction to grant the relief prayed for, so that the question may be presented to the Appellate Division, if desired.

Motion denied.

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MARGARET JOYCE, Plaintiff, *v.* EASTMAN KODAK COMPANY, Defendant.

(Supreme Court, Monroe Special Term, March, 1917.)

Calendar — when case stricken from — notice of trial — pleading — evidence — motions and orders — rule 37 of General Rules of Practice — Code Civ. Pro. §§ 542, 768, 977.

Under section 977 of the Code of Civil Procedure a case must be stricken from the calendar where the notice of trial was served within fourteen days of the commencement of the term after joinder of issue by the service of an amended answer unless the amended answer was interposed for delay in which event it may be stricken out under section 542 of the Code of Civil Procedure and the case allowed to remain on the calendar.

Where an amended answer sets up new matter which may be a complete defense to the cause of action the new matter will not be stricken out and a reply will be directed whether the completeness of the defense can be determined by a motion on the pleadings or will require evidence to establish it upon the trial.

Under section 768 of the Code of Civil Procedure and rule 37 of the General Rules of Practice where a notice of motion of ten days has been given and answering affidavits have been requested additional answering affidavits may be filed in the discretion of the court, if not as a matter of right, one day prior to the time at which the motion is noticed to be heard.

MOTION to strike case from calendar and to compel a reply.

Hubbell, Taylor, Goodwin & Moser (Clarence P. Moser, of counsel), for motion.

McInerney & Bechtold (John J. McInerney, of counsel, opposed.

RODENBECK, J. 1. The defendant is entitled to have this case stricken from the present trial calendar. It was

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noticed for trial and placed upon the calendar within fourteen days after issue joined by the service of an amended answer. A case may be placed upon the calendar only as provided by section 977 of the Code of Civil Procedure. These provisions are statutory and the court has no discretion in the matter. The defendant had the right to amend its answer of course within twenty days after the service of its original answer (Code Civ. Pro. § 542) and the service of the amended answer destroyed the original issue and created a new issue. The court may, however, strike out an amended answer where it appears that it was interposed for delay and may allow the case to remain on the calendar. Where the new matter set up in the amended answer is not invalid in law but depends for its validity upon facts which may be established at the trial, it cannot be stricken out. *Beyer* v. *Huber Co.*, 115 App. Div. 342. It cannot be said that the amended answer in this case was interposed for delay. There are substantial changes in the denials and admissions and defenses not in the original answer are set up which go to the gist of the cause of action. The case must be stricken from the present calendar. *Ostrander* v. *Conkey*, 20 Hun, 401; *New York Insulated Wire Co.* v. *Westinghouse E. & M. Co.*, 85 id. 269; *Coler* v. *Lamb*, 19 App. Div. 236; *Murphy* v. *Lyon*, 127 id. 448; *Yates* v. *McAdam*, 18 Misc. Rep. 295; *Jones* v. *Seaman*, 30 id. 65.

2. The plaintiff should also be required to reply to the third defense set up in the amended answer. The complaint alleges that the plaintiff was employed by the defendant as an office assistant and the amended answer sets up that she was engaged in a hazardous employment coming within the provisions of the Workmen's Compensation Act and that recourse to compensation under that act is an exclusive remedy. The

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Workmen's Compensation Act as adopted defined an employee as " a person who is engaged in a hazardous employment, etc." Laws of 1913, chap. 816, § 3, subd. 4. Under this language the Appellate Division of the third department has held that the protection afforded by the statute did not extend to persons who were not actually engaged in a hazardous employment although the business in which they were employed might be one of those enumerated in the statute as a hazardous employment. *Matter of Gleisner* v. *Gross Hebener,* 170 App. Div. 37; *Matter of Aylesworth* v. *Phoenix Cheese Co.,* Id. 34; *Lyon* v. *Windsor,* 173 id. 377; *Matter of Fogarty* v. *National Biscuit Co.,* 175 id. 729. The Court of Appeals, however, has given a much broader construction to the statute and has extended it to an employee who is performing an act " which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs," and has discarded the construction that it must be confined to cases where the act is "a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which the employment is claimed." *Matter of Larsen* v. *Paine Drug Co.,* 218 N. Y. 252, 256. It is also significant that the legislature has changed the definition of an employee so as to include " a person engaged in one of the occupations enumerated in section 2, etc." Laws of 1916, chap. 622, § 3, subd. 4, in effect May 20, 1916. The amended language of the statute does not apply to the plaintiff in this case because her injuries were received prior to the date when the statute went into effect but it may be taken into consideration in construing the former language of the statute in conjunction with the language of the Court of Appeals to which reference has been made. These observations

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are sufficient to show that a serious question has been raised by the new matter set up in the amended answer and the plaintiff should be required to reply to the new matter so that the defendant may make a motion for judgment upon the pleadings if it desires or try out the issue of fact if one exists upon the trial. *Barker* v. *O'Grady*, 98 Misc. Rep. 42; *Weglein* v. *Trow Directory P. & B. Co.*, 152 App. Div. 705; *Shanahan* v. *Monarch Engineering Co.*, 219 N. Y. 469.

3. The plaintiff served an answering affidavit one day before the motion was heard and the defendant claims that the affidavit cannot be considered on this motion, having been brought on upon a ten days' notice. Section 768 of the Code of Civil Procedure provides that where at least eight days' notice of motion has been given affidavits in answer to the motion shall be served at least one day prior to the time at which the motion is noticed to be heard. It will be observed that this language applies to motions where at least eight days' notice shall have been given and that answering affidavits may be served at least one day prior to the time at which the motion is noticed to be heard. These provisions are directions of the legislature and being statutory may be claimed by a litigant as a matter of right and cannot be abrogated by a rule of court. The courts may adopt rules not inconsistent with statutory regulations but they cannot nullify them. If there were no statutory provisions on the subject the whole matter could be regulated by rules, but so long as the legislature has attempted to regulate the subject the courts are powerless to adopt any rules in conflict therewith. Rule 37 of the General Rules of Practice provides that where the attorneys for the respective parties reside or have their offices in the same city or village a notice of five days shall be sufficient. Where such a notice is given in a city or village the opposing

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attorney still has the right to serve answering affidavits at least one day prior to the time at which the motion is noticed to be heard. The rule, however, further provides that where the notice of motion is served ten days before the return day thereof and a request is made for answering affidavits within five days before the return day such affidavits must be so served that the moving party receiving such affidavits may serve reply affidavits at least two days before the hearing and that affidavits in answer and reply cannot be read upon the motion if not so served "unless the court in its discretion for good cause shown may otherwise order." This seems to be a curtailment of the right of the litigant under section 768 of the Code where a ten days' notice is given to serve answering affidavits "at least one day prior to the time at which the motion is noticed to be heard." These attempts at regulating a matter of practice by the legislature and by the courts may emphasize the evil of a mixed statutory and court rule practice. If the legislature had not attempted to regulate this subject at all it could be consistently handled by court rules and the whole matter there treated. In this particular case the answering affidavit was served at least one day prior to the time at which the motion was noticed to be heard so that the court under rule 37 had the power as a matter of discretion to permit the answering affidavit to be used upon the motion and it becomes unnecessary to pass upon her legal right to submit the affidavit.

The motion to strike the case from the calendar and the motion to require the plaintiff to reply to the defense set up in defendant's amended answer are both granted, with ten dollars costs in the first motion to abide the event.

Ordered accordingly.

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FRANCIS B. MITCHELL, Plaintiff, *v.* NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY and FRED D. COREY, Defendants.

(Supreme Court, Monroe Equity Term, March, 1917.)

Pleading — complaint — demurrer — equity — actions — parties — damages — Code Civ. Pro. § 484.

A demurrer under section 484 of the Code of Civil Procedure will not lie to a complaint in equity when the subject of the action is certain land and the transactions involved in the action are connected therewith, although the complaint contains two or more causes of action, legal and equitable, where they all arose out of the same transactions, are embraced in one or more of the subdivisions of said section, are consistent with each other and the defendants are all interested in some part of the relief prayed for and different places of trial are not required.

A complaint in equity which charges a defendant with false representations in obtaining a conveyance of land whereby more land was included in the conveyance than was agreed to be conveyed and with a failure to convey to plaintiff land which it agreed to convey, and which seeks to compel a conveyance to plaintiff of the latter land, subrogating him to a claim for compensation for a portion thereof appropriated by the state and making the owner a party to secure such conveyance and subrogation; to reform the deed of the first mentioned land; a reconveyance of the excess lands; damages caused during the occupancy of such excess lands under the alleged unlawful conveyance and the removal of structures on the property unlawfully conveyed, is not demurrable under section 484 of the Code of Civil Procedure.

DEMURRER to complaint by both defendants.

Strebel, Corey, Tubbs & Beals, for demurrer.

James M. E. O'Grady, opposed.

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RODENBECK, J. The claims set forth in the plaintiff's complaint arose out of the same transaction or out of transactions connected with the same subject of action between him and the defendant the Niagara, Lockport and Ontario Power Company, and the defendant Fred D. Corey is interested in part of the relief asked for and is a necessary party to a complete determination of the litigation and the demurrer should therefore be overruled.

The defendants claim that there are four distinct causes of action set forth in the complaint. This claim would be good if this were not an action in equity. It is true that causes of action cannot be united except as provided in section 484 of the Code of Civil Procedure, but subdivision 9 is intended to include cases chiefly equitable where the causes of action arose out of the same transaction or out of transactions connected with the subject of action and thereby permits the joinder of causes of action which otherwise would require separate suits. The plaintiff agreed to convey certain land to the defendant the Niagara, Lockport and Ontario Power Company, which in turn agreed to convey to him as a part of the consideration a triangular parcel of land. A deed was executed by the plaintiff purporting to carry out the agreements and the consideration stipulated was paid, but the plaintiff claims that the deed was executed under false representations and that it includes land which he had not agreed to convey and that the defendant company has not conveyed to him the triangular parcel of land referred to, the title to which is now in the defendant Corey. Out of these transactions the various claims of the plaintiff arose. He asks to have the deed executed by him reformed, a reconveyance made to him of the land unlawfully included in the deed, damages for the occupation of such excess land and for the unlawful

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removal of trees claimed by the plaintiff to be included in the conveyance and for the removal of unlawful structures placed upon the land in pursuance of the alleged illegal conveyance to him of the triangular parcel of land referred to with a subrogation to the rights of the defendant Corey to claims for damages for portions appropriated by the state. In construing the language of the complaint as involving transactions connected with the same subject of action the plaintiff is entitled to the benefit of the rule that the court must consider not only the express allegations contained therein but such facts as may be implied therefrom by reasonable and fair intendment. *Crotty* v. *Erie R. R. Co.*, 149 App. Div. 262, 263.

The claims of the plaintiff, it will be observed, are interwoven and connected with the same subject of action. There are causes of action united but the Code expressly authorizes the union of "two or more causes of action." It is no ground for demurrer that material for more than one cause of action is stated in the complaint. *Metropolitan Trust Co.* v. *Stallo*, 166 App. Div. 639, 656. A single or entire cause of action cannot be broken up into several claims and separate actions maintained thereon. *Chalmers* v. *Murphy*, 159 App. Div. 810, 814; *Secor* v. *Sturgis*, 16 N. Y. 548; *Nathans* v. *Hope*, 77 id. 420. There is a union of legal and equitable causes of action but this course is also permitted by the Code which authorizes the union of two or more causes of action whether they are "legal or equitable." There are two or more causes of action because there are violations of primary rights and a breach of such rights, but these causes of action arise out of the same transactions between the plaintiff and the defendant company, namely, the acquisition of the land necessary for its right of way or they form part of the same transactions connected with the same sub-

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ject of action. In this instance the subject of action is the land owned by the plaintiff which was desired by the company for which it made agreements with the plaintiff which the plaintiff claims it violated and out of which grew the various claims set forth in the complaint. *Rogers* v. *Wheeler*, 89 App. Div. 435, 441. It is not necessary in an action in equity that all of the causes of action shall belong to one only of the subdivisions of the Code section where they fall within the language of subdivision 9 nor is it necessary that all of the defendants should be equally affected by the relief asked for. It is true even in equity that all of the defendants must be affected by the action but not that they shall be equally affected. *New York & N. H. R. R. Co.* v. *Schuyler*, 17 N. Y. 592; *Shepard* v. *Manhattan R. Co.*, 117 id. 442; *Simar* v. *Canaday*, 53 id. 298; *Gray* v. *Fuller*, 17 App. Div. 29, 36; *Rogers* v. *Wheeler*, 89 id. 435, 442; *Mullin* v. *Mullin*, 119 id. 521; *People* v. *Equitable Life A. Soc.*, 124 id. 714, 729. These views are in harmony with the rule that equity seeks a complete and final determination in a single action of all matters between the parties growing out of the same general transaction (*Lamming* v. *Galusha*, 135 N. Y. 239) and that where a court of equity has obtained jurisdiction of a case it will ordinarily retain it until the whole controversy is disposed of and will adapt its relief to the exigencies of the case. *Koehler* v. *New York El. R. R. Co.*, 159 N. Y. 218, 223; *Valentine* v. *Richardt*, 126 id. 272; *Ostrander* v. *Weber*, 114 id. 95; *Witherbee* v. *Meyer*, 84 Hun, 146. If precedents for these views are necessary they will be found in the following cases: *Bosworth* v. *Allen*, 168 N. Y. 157; *Lamming* v. *Galusha*, 135 id. 239; *Lattin* v. *McCarty*, 41 id. 107; *Shepard* v. *Manhattan R. Co.*, 117 id. 442; *Miles* v. *Dover F. I. Co.*, 125 id. 294; *Metropolitan Trust Co.* v. *Stallo*, 166 App. Div. 639; *Porter* v. *International Bridge Co.*, 45 id. 416;

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affd., 163 N. Y. 79; *Green* v. *Davies*, 100 App. Div. 359; *Rourke* v. *Elk Drug Co.*, 75 id. 145; *Eagan* v. *New York Trans. Co.*, 39 Misc. Rep. 111.

The interpretation of section 484 of the Code of Civil Procedure which is referred to in these decisions is well expressed by Judge Comstock in *New York & N. H. R. R. Co.* v. *Schuyler*, 17 N. Y. 592, where he says with reference to subdivision 9 of that section: "Its language is, I think, well chosen for the purposes intended because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice." In *Wiles* v. *Suydam*, 64 N. Y. 173, Judge Church said with reference to this subdivision: "It is probable that the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject matter of the action" (p. 178), and Professor Pomeroy said: "The language was properly left vague, so that it might not interfere with the settled doctrines of equitable procedure and pleading, practice and remedies." Pom. Rem. & Rem. R. (2d ed.) § 463. The whole section should be repealed and a modernized provision inserted in its place. It should be sufficient to provide by a rule or statute that subject to the constitutional right to a jury trial any number and all kinds of causes of action or counterclaims may be set up in the same complaint or answer ~~subject to~~ an order for a separate trial of any issue where it may be deemed expedient or necessary, similar to the provision found in the English, New Jersey and United States equity practice. English Pr. Rules, 0.18, r. 1; Practice Act of New Jersey, 1912, §§ 11, 12; U. S. Equity Practice, r. 26. The idea that practice in the courts is a game to be played according to rules like any other game a violation of which results in a

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penalty cannot be eradicated from our practice until it is regulated by elastic rules of court instead of by fixed statutory provisions conferring so-called procedural rights.

The demurrer is overruled with ten dollars costs, with leave to defendants to withdraw their demurrer and answer within twenty days after service of an order in accordance herewith.

Demurrer overruled, with costs.

EDWIN C. SMITH and DELBERT C. HEBBARD, Plaintiffs, *v.* FREDERICK A. BROTSCH, JR., and Others, and the PURE STRAIN FARMS COMPANY, Defendants.

(Supreme Court, Monroe Special Term, March, 1917.)

Real property — order requiring sheriff to put a person in possession of, granted — Code Civ. Pro. § 1675.

Under section 1675 of the Code of Civil Procedure an order of the court requiring the sheriff to put a person into possession of real property supersedes the ancient writ of assistance as to actions brought under title 1 of chapter 14 of the Code and may be granted *ex parte* in the discretion of the court.

APPLICATION *ex parte* for an order of assistance.

Edwin C. Smith, for motion.

RODENBECK, J. The former practice relating to the issuance of a writ of assistance to get possession of real property under a judgment has been superseded with reference to actions relating to real property under title 1 of chapter 14 of the Code of Civil Procedure by an order of the court to be issued in its discretion requiring the sheriff to secure possession for

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the proper party. Under this section plaintiffs in this action, being an action to foreclose a mortgage, are entitled to such an order *ex parte*. There is nothing in the section which requires notice and as the former writ of assistance could be issued without notice so an order under the present provision may so issue. *New York Life Ins. & Trust Co.* v. *Rand*, 8 How. Pr. 35; *New York Life Ins. & Trust Co.* v. *Cutler*, 9 id. 491; *Lynde* v. *O'Donnell*, 21 id. 34, 39. A previous motion for such an order was made in this case and denied* but new facts exist which justify a renewal and granting of the motion. General Rules of Practice, rule 25. The Pure Strain Farms Company which opposes the possession of the plaintiffs although they have a conveyance under the foreclosure and sale was a party to the action of foreclosure. It was not originally made a party but it made an application to intervene and this application was granted. It did not serve its answer within the time required by the order of intervention and became in default. Instead of moving to open its default it commenced an action to set aside the mortgage foreclosed on the strength of a deed unrecorded at the time that the mortgage was given of which it claimed the plaintiffs had knowledge. This action was pending when the previous application for an order of assistance was made but since that application the complaint in that action has been dismissed and there is now no cloud on the right of the plaintiffs to the possession of the premises and to an order of assistance to put them in possession. 2 Ency. Pl. & Pr. 975; 1 Abb. Dig. 1043; *De Lancey* v. *Piepgras*, 141 N. Y. 88, 96; *Bowery Savings Bank* v. *Foster*, 11 Wkly. Dig. 493. Under the present practice this order takes the place not only of the former writ of assistance (*Title Guar-*

* See 99 Misc. Rep. 108.—[REPR.

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antee & T. Co. v. *American P. & C. Co.*, 95 App. Div. 192) but answers all the purposes of an execution and must be carried out by the sheriff upon being presented with a certified copy of the order as if it were an execution for the delivery and possession of the property. Code Civ. Pro. § 1675. See Throop's Notes. The provisions relating to the enforcement of judgments are scattered through the Code of Civil Procedure and the whole subject might be simplified along the lines of the rules prepared by the board of statutory consolidation. See Report of Board, r. 378 *et seq.*

Motion granted.

CHARLES F. DUNBAR, Plaintiff, *v.* EDWARD SWEENEY and JOHN W. SWEENEY, Defendants.

(Supreme Court, Niagara Special Term, March, 1917.)

Injunctions — who entitled to — action for — deeds — mortgages — damages — water rights — trespass — evidence — judgments.

By a deed of conveyance of the lands now owned by plaintiff, made by the owner of the premises now owned by defendants, the grantor expressly reserved to himself and to his heirs, grantees and assigns the right to draw at any and all times as much water from a certain spring upon the granted premises as could be drawn and conveyed continuously through a certain pipe laid as described in the deed, and the grantee gave back a purchase money mortgage which recited that it was subject to identically the same reservation. Prior to the foreclosure of said mortgage, upon which plaintiff's title rests, the grantor became vested with the equity of redemption in both parcels and in the meantime assigned the first mortgage. He then mortgaged the premises now owned by defendants without any express reference to such reservation in favor thereof, and defendants derived their title through the foreclosure of that mortgage. Defendants erected upon their premises a cold storage warehouse for fruit and a plant for refrigeration and

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for the manufacture of ice for the refrigeration of cars shipped out of their plant and for the sale of surplus ice and for those purposes excavated a large well hole or cistern upon their own premises to a depth of nearly three feet below the level of the bottom of the spring on plaintiff's premises and thereby cut off the natural flow and percolation of water through their premises to said spring and accumulated the water in the well from which they pumped and used it, thereby excluding plaintiff from and depriving him of the use and enjoyment of his spring. In an action for injunctive relief, *held:*

That while the reservation of the water rights was covered by the mortgage, through which defendants claim as appurtenant to the mortgaged premises, and passed to the purchaser on foreclosure of the mortgage and to his grantees, such rights constituted a use of the water from the spring in part subordinate to the rights of the owner of the spring which had always been fed by the flow or percolation of water under the surface of the ground through defendants' lands, and otherwise in common, but not to the exclusion of the use of the spring by the owner.

That defendants' use of the water although intercepted and taken wholly from their own land is unreasonable and in violation of plaintiff's rights entitling him to an injunction to confine such use to the reasonable requirements and enjoyments of their lands, as such, which will exclude the use of the water for manufacturing ice to be shipped out as refrigeration or to be used off the premises for any purpose to the diminution of the flow of sufficient water to the spring for plaintiff's use in connection with his land.

That since defendants have a lawful right to use the water in connection with their land and the comfortable and convenient use and enjoyment thereof, but not for a commercial purpose when that will interfere with plaintiff's use and enjoyment of the spring, the case is a proper one for alternative relief by way of permanent damages to the fee instead of injunctive relief.

The fact that when the action was commenced there was a continuing trespass, consisting in the wrongful discharge and drainage of water upon and over plaintiff's premises, was sufficient evidence of a threatened continuance of the trespass to entitle plaintiff to an injunction in that regard, in any event.

ACTION for an injunction.

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George D. Judson, for plaintiff.

S. Wallace Dempsey, for defendants.

LAUGHLIN, J. This is a suit in equity for injunctive relief with respect to an alleged unlawful interference by defendants with the subterranean flow of water, under premises owned by them, to a spring on adjoining lands owned by plaintiff; and with respect to an alleged continuing trespass by defendants by collecting water in artificial channels and discharging it upon plaintiff's lands.

The plaintiff acquired title to and was in possession of the premises, on which there was a perpetual spring of wholesome water known as the Cataract Spring, prior to the time the defendants came into ownership and possession of their adjoining lands, which were then entirely vacant and unimproved. The spring had existed and been in use for upwards of forty years for domestic purposes by the occupants of plaintiff's lands which were improved and upon which a canal grocery business was conducted for commercial purposes in supplying Erie canal boats with water. Formerly the premises owned by plaintiff, and those owned by defendants, were owned in common. On the 13th day of April, 1894, the common owner conveyed the premises now owned by the plaintiff with a reservation for the benefit of his remaining lands, which embraced those now owned by the defendants as follows: "Reserving, however, unto the party of the first part, hereto and to his heirs, grantees and assigns the right to enter into and upon the premises hereinbefore described and to excavate and do all acts necessary to lay, construct, maintain, keep in repair and renew a pipe two inches in diameter from the Spring located on said premises, known as the Cataract Spring, either

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at a point three inches below the high water mark of said Spring or from a tank to be erected below said Spring to catch the waste water of said Spring underground, through and across said lands to any point upon the lands now owned by the party of the first part lying directly south of the lands hereby conveyed as may be desired by said party of the first part and the said first party hereby expressly reserves the right to himself and to his heirs, grantees and assigns to draw from said Spring at any and all times as much water as can be drawn and conveyed continuously from the said Spring, through the said two inch pipe laid as hereinbefore described, but not so as to interfere with the supply sufficient for all canal purposes of the parties of the second part."

At the same time the grantee gave back to the grantors a purchase money mortgage on the premises so conveyed containing a recital showing that it was subject to identically the same reservation as that contained in said deed. The plaintiff's title rests on a conveyance on a foreclosure of said mortgage. Prior to said foreclosure the grantor mortgaged his remaining premises, including those now owned by defendants, without any express reference to said reservation in favor thereof. The defendants derived their title through the foreclosure of the last mentioned mortgage. After the execution of said last mentioned mortgage the premises covered by the first mentioned mortgage were reconveyed to the grantor thereof, so that before the foreclosure of the first mentioned mortgage he became vested with the equity of redemption in both parcels, having in the meantime assigned the first mentioned mortgage. The learned counsel for the plaintiff contends that the water rights so reserved were not covered by the mortgage through the foreclosure of which defendants derived title, and that

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upon the revesting of title to both parcels in the common owner they became merged. I am unable to agree with that contention and am of opinion that the reservation of the water rights was covered by the mortgage, through which defendants claim, as appurtenant to the premises mortgaged and passed to the purchaser on the foreclosure thereof and to his grantees. *Hankey* v. *Clark,* 110 Mass. 262; *Mason* v. *Thwing,* 94 App. Div. 77; *Babcock* v. *Utter,* 40 N. Y. 397; *Dexter S. P. Co.* v. *Frontenac P. Co.,* 20 Misc. Rep. 442. Although defendants have succeeded to the reserved water rights that is not a defense to this action, for they have not attempted to exercise those rights as authorized. Moreover, those rights constituted a use of the water from the spring in part subordinate to the rights of the owner of the spring and otherwise in common, but not to the exclusion of the use of the spring by him.

The spring has always been fed by the flow or percolation of water under the surface of the ground through the lands now owned by defendants. The defendants do not use this land for agricultural or residential purposes, and they require no water for domestic use on their premises. Their premises are used exclusively for business purposes. They erected thereon a cold storage warehouse for fruit and a plant for refrigeration and for the manufacture of ice for the refrigeration of cars shipped out of their plant and for the sale of surplus ice not required for that purpose. For those purposes they excavated a large well hole or cistern on their own premises, but within a few feet of plaintiff's spring, to the depth of nearly three feet below the level of the bottom of the spring, and thereby cut off the natural flow and percolation of water through their premises to plaintiff's spring and accumulated the water in the well or reservoir from

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which they pumped and used it, and thereby exclude the plaintiff from and deprive him of the use and enjoyment of his spring.

I am of opinion that such use of the water, although intercepted and taken wholly from the lands of the defendants, is unreasonable and in violation of plaintiff's rights under the modern rule on this subject and entitles him to an injunction to confine such use to the reasonable requirements and enjoyments of the lands of the defendants as such, which will exclude the use of the water for manufacturing ice to be shipped out as refrigeration or to be used off the premises for any purpose to the diminution of the flow of sufficient water to the spring for the plaintiff's use in connection with his land. See *Lowndes* v. *Huntington Water Works Co.*, 163 App. Div. 37; *Forbell* v. *City of New York*, 164 N. Y. 522–526; *Smith* v. *City of Brooklyn*, 18 App. Div. 340; affd. on another ground, 160 N. Y. 357; *Hathorn* v. *Natural Carbonic Gas Co.*, 194 id. 326; *People* v. *New York Carbonic Acid Gas Co.*, 196 id. 421, 431–434; *Westphal* v. *City of New York*, 177 id. 140. On the trial the court was of opinion that this might be a proper case for the application of the rule with respect to alternative relief by way of permanent damages to the fee instead of injunctive relief, which has been sanctioned in somewhat similar cases (see *Westphal* v. *City of New York, supra*), and on that theory evidence with respect to fee damages was received. Neither party, however, asked that the rule be applied here. Counsel for plaintiff insists that it should not be applied and counsel for defendants insists that there has been no invasion of plaintiff's rights or diminution in either rental or fee value for which he can recover against defendants. I find otherwise on both points and am of opinion that since defendants have a lawful right to use the water in connection with their

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land and the comfortable and convenient use and enjoyment thereof but not for commercial purposes or to make ice to be sold or used off the premises when that will interfere with plaintiff's use and enjoyment of the spring — this is a proper case for alternative relief to the end that further litigation likely to arise may be avoided, provided the defendants prefer to pay the fee damages rather than to be enjoined with respect to the maintenance of their well or reservoir and the use of water therefrom. The injunctive relief in that regard will, therefore, be withheld for thirty days, and if during that time the defendants shall pay or tender to the plaintiff the fee damages as fixed by the decision and the rental damages as found, together with interest on both amounts from the 1st day of July, 1915, upon plaintiff's releasing to them the right to maintain and use their well or reservoir as now constructed and used without restriction, then such injunctive relief will be denied, and unless plaintiff shall execute and deliver such release or such tender he will be left to his remedy at law for damages with respect to the interference with his rights concerning the spring.

There was a continuing trespass consisting in the wrongful discharge and drainage of water upon and over plaintiff's premises when the action was commenced, and there is sufficient evidence of a threatened continuance thereof to entitle plaintiff to an injunction in that regard in any event.

I have in many instances modified proposed findings to conform to the facts as I see them and have found the requests as so modified. In every such instance the party making the request, if not satisfied with the modifications, may regard the rulings as a refusal to find as requested.

It follows that plaintiff is entitled to judgment as

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indicated in the conclusions of law presented in his behalf as modified and supplemented by the court.

Judgment accordingly.

NEAL, CLARK & NEAL CO., Appellant, v. MICHAEL J. TARBY (first name unknown), Respondent.

(Supreme Court, Erie Special Term, March, 1917.)

Sales — what constitutes — parties — actions — appeal — Personal Property Law, § 129.

While the delivery of a victrola with an option to purchase at a certain price neither constitutes a sale nor a transfer of title until acceptance of the offer, yet where the buyer sells and delivers the victrola to another he does an act "inconsistent with the ownership of the seller" within the meaning of section 129 of the Personal Property Law, and, in the absence of fraud, the transaction becomes a consummated sale between the parties.

While the seller may sue the buyer from him for the agreed purchase price, he cannot maintain an action in replevin against the one to whom said buyer sold the instrument, and a judgment for the dismissal of the complaint in such an action will be affirmed.

APPEAL from a judgment of the City Court of Buffalo, dismissing the plaintiff's complaint in an action of replevin.

Walter W. Chamberlain, for appellant.

John M. Hull, for respondent.

WHEELER, J. The facts in this case are undisputed, and briefly stated are: That the plaintiff, among other things, deals in victrolas; one Fertig was the solicitor of advertising, and in that capacity was accustomed to

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visit the plaintiff's store. On the occasion of one of his visits the subject of the purchase of a victrola was brought up by one of plaintiff's salesmen. Fertig was asked if he had decided to purchase a victrola, to which he replied: "No, we haven't reached a point where we will decide on it." The salesman suggested sending one out on approval, to which Fertig replied: "If you want to take a chance and send it out on approval, with the understanding I don't have to purchase it unless I want it, all right." To this the salesman replied: "All right, I will send it out with a selection of records, and see if we can't later sell you the machine."

They then selected a victrola of the price of $150, which seems to have been fully understood, and the machine was delivered to Fertig. The salesman testified that some time later he asked Fertig if he had decided to purchase, to which Fertig replied: "We haven't quite decided to purchase the machine." To which the salesman replied: "All right; let us know when you are ready."

It further appears that Fertig moved the machine to the Lenox Hotel, where he went to live; and while there sold and delivered the victrola to the defendant in this action, who paid Fertig seventy-five dollars therefor. Fertig then left and has not since been seen.

The plaintiff learning the facts, and claiming to own the machine, demanded it of the defendant who refused to deliver it up. The plaintiff then brought this action in the City Court to recover possession. The City Court dismissed its complaint, and the case now comes before this court on appeal.

The plaintiff, in substance, contends there never was any consummated sale; that the title of the property never passed to Fertig, and he could give none to the defendant; that Fertig stole or converted the victrola to his own use, and the plaintiff should have recovered.

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The defendant contends he is protected as a *bona fide* purchaser for value under the provisions of the Personal Property Law, and that the court below did not err in dismissing the plaintiff's complaint.

The defendant stands on the provisions of section 129 of that act, providing: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted thereof, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he returns the goods without intimating to the seller that he has rejected them."

It seems to us that this section governs the case here presented for review.

If we correctly interpret the transaction between the plaintiff and Fertig, it amounted to this: The plaintiff delivered to Fertig the victrola in question for trial, with the option to purchase it at the price of $150. This offer was at no time canceled or recalled by the plaintiff. There was evidently, under this arrangement, no actual sale, and no transfer of title to Fertig, until he had accepted the offer, or until he did some act in relation thereto "*inconsistent with the ownership of the seller.*" The instant Fertig undertook to sell the machine as his own, he did an act inconsistent with the ownership of the plaintiff. It was evident that he had, in fact, acted upon the plaintiff's option to sell, and, in the absence of fraud, it became a consummated sale between the parties to it. Under such circumstances, I think there can be no question but what the plaintiff would have had a perfect right to have sued and recovered from Fertig the agreed purchase price of the machine.

Section 100 of the Personal Property Law also provides: "When goods are delivered to the buyer on

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approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer — (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction." See Rule 3, subd. 2, § a.

It is argued by counsel for the appellant that this particular provision has no application because the word " buyer " contemplates a completed sale, as distinguished from a possible one, and that in this case there was no promise on the part of Fertig to purchase at all, even though the victrola proved satisfactory, and therefore Fertig never was a " buyer " within the meaning of the section.

We think the construction contended for too narrow. The very language used makes the section applicable to contemplated, as distinguished from actual, sales, for it provides that title shall pass in cases of delivery to the buyer " when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction." Consequently, when the words " buyer " and " seller " are there employed, they are used to designate parties to a transaction where a contemplated sale is the subject of negotiation.

Neither should the court overlook the words *" or other similar terms,"* used in the statutes. It was the evident intent of the legislature, by this language, to cover every possible transaction where property is delivered to a buyer in view of a contemplated although uncompleted sale.

It is urged, and with force, that the act of Fertig in selling the victrola to the defendant was not, after all, an act affirming or accepting the right to purchase at an agreed price, but really a conversion or larceny of the property delivered to him, and therefore ought not to defeat the right of the plaintiff to follow the property into whosever hands it may be found.

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We think, however, the provisions of the Personal Property Law above quoted were designed not only to define the rights of parties to such transactions as between themselves, but also to afford protection to third persons who may deal with the buyer on the strength of his apparent ownership of the property possessed, so that any one intrusting another with the possession of property under circumstances such as in this case does so largely at his own risk, while an innocent purchaser dealing with one in possession will be fully protected.

Section 105 of the Personal Property Law expressly provides: "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defects of title."

The section quoted is little more than declaratory of the common law, and seems to be predicated on the maxim that where one of two innocent parties must suffer, he must suffer who has placed the offender in a position to do the wrong to the other.

I am of the opinion that the judgment appealed from should be affirmed.

Judgment affirmed.

THOMAS NOLAN, Plaintiff, *v.* CATHERINE PHILLIPI, Defendant.

(Supreme Court, Erie Trial Term, March, 1917.)

Cloud on title — removal of — deeds — when assessment and sale of lands for unpaid taxes are void — when owner entitled to judgment.

Where lands assessed and sold for unpaid taxes cannot be identified in the assessment roll and the certificate of sale, both the assessment and the sale are void for uncertainty.

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Where property consisting of about twelve acres was described by appropriate metes and bounds in deeds of conveyance forming the chain of title, a sale by the county treasurer for unpaid taxes under an assessment to a certain named person, as owner, who never lived on or ever had any interest in the property, which was simply described both in the assessment roll and the certificate of sale as eleven and one-quarter acres, no boundary line being given, the owner is entitled to judgment in an action to remove the certificate of sale as a cloud upon his title.

ACTION to remove a cloud on title.

Lawrence P. Hancock, for plaintiff.

Emery & Georgi, for defendant.

WHEELER, J. The plaintiff is the owner of about twelve acres of land in the town of West Seneca, Erie county. This property is described by appropriate metes and bounds in deeds of conveyance forming the chain of title.

This action is brought to remove as a cloud on title to this parcel a certificate of sale issued by the county treasurer of Erie county to Louis Phillipi, by which the county treasurer purported to sell, in 1903, for unpaid county taxes of 1901, premises assessed to "William Connors," and described in the assessment roll and in the certificate of sale as part of farm lot 192, township 10, range 7; eleven and one-quarter acres, in the town of West Seneca.

This certificate of sale was assigned to, and is now owned and held by, the defendant in this action.

The evidence shows that no such person as "William Connors" ever lived on the land owned by the plaintiff, or ever had any interest in it; and that no such person was known among the persons living in the vicinity.

It will be noted that in describing the property

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assessed and sold for unpaid taxes, the eleven and one-quarter acres are given no boundary lines. It does not appear from what part or portion of farm lot 192 this eleven and one-quarter acres is to be taken. No one with such a description would be able to locate or identify any particular parcel of land as the parcel intended to be described or sold.

Subdivision 5 of section 30 of the Tax Law of New York provides that if the property assessed "*be a part of a lot, the part must be distinguished by boundaries or in some other way by which it may be identified.*" It goes without argument that this provision of the statute was wholly disregarded.

Where the property assessed and sold cannot be identified by the description, the assessment and sale are void for uncertainty. *People* v. *Stilwell,* 190 N. Y. 293; *Matter of N. Y. C. & H. R. R. R. Co.,* 90 id. 348; *Zink* v. *McManus,* 121 id. 259; *Fulton* v. *Krull,* 200 id. 105.

The defendant's counsel urges, however, that under the provisions of sections 150 to 160 of the Tax Law of the state it is declared that the provisions of article 6 of the same chapter shall govern and control the action of the county treasurer, "*and the same rights and remedies shall be deemed to exist under the provisions of this article as are provided for in article six.*"

Referring back, therefore, to section 131 of article 6 (which relates to sales and conveyances by the state comptroller for unpaid taxes), it is provided that such conveyance by him "shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of lands sold, and that all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and in accordance with all

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the provisions of law relating thereto. After two years from the date of such conveyance such presumption shall be conclusive."

It seems to be held by the courts that the provisions of this section apply to proceedings taken by the county treasurer for the sale of land for unpaid taxes. *Cone* v. *Lauer*, 131 App. Div. 193; *Clinton* v. *Krull*, 125 id. 159; *Sheldon* v. *Russell*, 91 Misc. Rep. 278.

It is therefore argued that the presumption of regularity is conclusive against the plaintiff in this action, and the action cannot be maintained.

We think it sufficient to say, in answer to the argument suggested, that the questions presented in this case are not simply ones of regularity of procedure on the part of the assessors, or of the county treasurer. The ground of attack on the assessment and on the sale and certificate given does not relate to the question whether certain notices were given, and other statutory requirements followed; but relate rather to the question whether under the particular description in the assessment and certificate of sale the plaintiff's property was in fact described, affected or conveyed. We hold that it was not, and that none of the things done by the assessors or county treasurer in any way created a tax lien on the plaintiff's land, or conveyed away any of his interest therein, because the description used described and identified nothing.

If the description employed had been sufficiently definite so that a particular parcel could have been located by it, the case presented would have been far different. In this case the proceedings conveyed nothing, just as a deed formally executed, containing a like description, would convey nothing.

In this case there is a further objection to the conclusiveness of the certificate of sale attacked. So far as appears, the county treasurer never executed or

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delivered to the holder of the certificate a deed of conveyance as provided by section 155 of the Tax Law. Referring back to the provisions of section 131 of the law, we find that "a conveyance of any lands so sold by him for taxes and not redeemed" shall vest title in the purchaser and "shall be presumptive evidence that the sale and all proceedings prior thereto," etc., "were regular and in accordance with all the provisions of law relating thereto. After two years from the date of such conveyance such presumption shall be conclusive."

It is the deed of conveyance as therein provided which raises the presumption of regularity, and not the execution of the certificate of sale, which is but a preliminary step to the perfection of title under sales for unpaid taxes. Until such deeds are given, the tax and all proceedings thereunder are open to attack for irregularity, the same as before the passage of the act, and the short Statute of Limitations provided by the section in question does not begin to run.

We are of the opinion, therefore, that the plaintiff is entitled to the judgment asked.

Judgment for plaintiff.

MICHAEL A. McINNIS, Plaintiff, *v.* CITY OF NEW ROCHELLE, Defendant.

(Supreme Court, Westchester Special Term, March, 1917.)

Taxes — what assessment roll should contain — city of New Rochelle — Tax Law, § 21(2).

Due process of law demands that an assessment roll contain a description of the property sufficient to identify the land intended to be assessed.

Under the provision of the charter of the city of New Rochelle which requires that property shall be designated or described on the assessment roll with reasonable certainty, and

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the requirement of section 21(2) of the Tax Law that assessment rolls shall state "the quantity of real property taxable to each person," an assessment on a house and lot as "No. 33 Woodbury street" is insufficient.

ACTION to cancel certain taxes and assessments.

Michael J. Tierney, for plaintiff.

Edward W. Davidson, for defendant.

YOUNG, J. This action is brought pursuant to section 1638 of the Code of Civil Procedure to compel the determination of a claim to real property. The object of the action is to procure a judgment declaring illegal and void the liens for certain unpaid taxes and assessments appearing against plaintiff's real property upon the records of the city of New Rochelle; and the ground of illegality is claimed to be that the property is insufficiently described on the assessment rolls upon which said assessments are based. The assessments complained of are in the following form upon the assessment rolls of the city:

Roll of	Tax of	NAME	Description of property	Location	Full value of land	Tax
1900	1901	Dunn, Daniel	House and lot.....	33 Woodbury st...	700	15.98
1901	1902	" "	" "	" "	700	24.94
1902	1903	" "	" "	" "	800	18.50
1906	1907	" "	" "	" "	1,000	24.62

The charter of the city of New Rochelle, chapter 128 of the Laws of 1899, under which the assessments were levied, required that properties be designated or described on the assessment roll with reasonable certainty, and the General State Tax Law upon the subject (Laws of 1909, chap. 62, § 21, subd. 2; Cons. Laws, chap. 60), requires that the assessment rolls shall state "the quantity of real property taxable to each person

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with a statement thereof in such form as the commissioners of taxes shall prescribe." The exact requirement of the statutes upon the subject, however, is not so important, as the courts have repeatedly held that "due process of law" demands that the assessment roll contain a description of the property sufficient to identify the land intended to be assessed.

The question therefore for decision is, whether the assessments in the form made describe the property assessed with definiteness sufficient to satisfy the constitutional requirement.

In *Noxon* v. *City of New Rochelle,* 63 Misc. Rep. 232, the description was "house and lot, Morris Street," and Mills, J., held this description insufficient following the decision in *Lawton* v. *City of New Rochelle,* 114 App. Div. 883.

In *French* v. *City of New Rochelle,* 141 App. Div. 8, the description was "land Webster and Winyah Avenues; * * * Plot of land Webster and Winyah Aves.; * * * Plot of land 600 by 600 Webster and Winyah Aves.," and "and 600 by 600 Webster and Winyah Ave." These descriptions were held insufficient, the court holding that they did not point out the quantity of land under the Tax Law; that the statute required a statement of the number of acres or square feet or rods or a description of the plot, the quantity of land being ascertainable by reference to an official map or by some other proper means so that the property shall be described and pointed out. In *Rupert* v. *Village of North Pelham,* 139 App. Div. 302, the property was assessed under the name of "Rupert Effe," and in a column headed "Quantity of land" it was described as "House and Lot No. 54." This was also held insufficient. The court said that there was nothing definite in this assessment save the words and figures No 54, which showed nothing certain beyond the fact

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that a number was given on the roll to the house and lot, and added: "While it is not essential that the description in the assessment roll be complete, it at least must be made reasonably certain by some reference stated in the assessment roll, or in some way incorporated in it. In other words, there must be some indication therein by which No. 54 can be certainly referred to some authenticated record, map, plat, or like."

In *Lawton* v. *City of New Rochelle,* 114 App. Div. 883, the description was simply "land Huguenot street," and was held insufficient as not conforming to the provisions of the Tax Law, the court saying: "In other words, it is essential to a valid assessment that there should be a statement of the quantity of land or a description of the same which will enable all persons interested to point out and designate the particular land which is the subject of assessment." P. 884.

In *Rhinehart* v. *O'Connor,* 173 App. Div. 942, the exact description contained in the assessment roll is not given, but it appears that certain boundaries were vague and indefinite as well as incorrect, and the assessment was held insufficient.

In *Fulton* v. *Krull,* 200 N. Y. 105, the assessments in question were made under the charter of Niagara Falls, which provided that the assessors "shall assess each lot or parcel of land separately, giving the name of the owner if known, or if not, the name of the occupant, if occupied, the part of the lot assessed, the number thereof, the street, side of street and number of feet fronting on street, or such other brief description as will enable the land intended to be known and located." The court held that these provisions differed from the General Tax Law, and provided a complete scheme of assessment which is not

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specifically repealed by the Tax Law. Certain assessments were held to contain insufficient description of the property attempted to be assessed. The particular description is not given in the opinion, but its substance as given by the court is that they are described as the "east part of said lot having 38 'feet front' and a depth of 66 feet and situate on the east side of a given street and north of the cross street." The court held this description as thus summarized without reference to the map to be wholly misleading and inadequate, that in fact these lots abutted on the sides of other lots and not on any street, and that there was nothing to apprise a person where the alleged frontage was located and from what point the line of depth of 66 feet was to be measured, and could not, without reference to the map, locate the premises assessed. It was also held that this description could not be helped out by resort to a map filed in the clerk's office but not referred to in the assessment roll.

In *People ex rel. National Park Bank* v. *Metz*, 141 App. Div. 600, the assessment in question so far as description is concerned was given in the following manner. Under a column headed "No. of lot" are shown the figures "239." The next column headed "description" is left blank. Under the next column headed "land acres" is the figure "1." Under a subsequent column headed "description of property and supposed owner" appears the word "Unionport." This word Unionport was only at the head of the column on the page containing this assessment opposite the first assessment on the page and was not repeated by ditto marks or otherwise opposite the assessment in question. On a previous page of the assessment roll at the beginning of assessments against numbered lots of Unionport there were entered in the same column as above given the words "Map

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of Unionport," but nothing further to identify the lot or the map either by date of the map, by whom made or where filed. The assessment was held insufficient.

In *Matter of N. Y. C. & H. R. R. R. Co.*, 90 N. Y. 349, the description of the land assessed was held to be insufficient to enable any one to locate the land sought to be taxed as appeared by comparison with a description of the land contained in the petition, the court saying: "There is given a front on Exchange street, but no definite courses for the remaining sides of the lot, nor other means of identification, or any lines by which the lot can be inclosed," and further, "An accurate designation or description of the land assessed is equally essential to the validity of the assessment, and without certainty in that respect no foundation is afforded for future action."

In *Lander* v. *Downs*, 141 N. Y. 422, the assessment was held invalid because the name of the plaintiff who was a non-resident was inserted in the first column of the assessment roll under the head of non-residents with his place of residence written thereunder. It was also held that the assessment was made in such a form as at least to leave it open to doubt whether plaintiff's name was so intended as a part of the description of the lands or for the purpose of including him among the taxable inhabitants, and that there was not a substantial compliance with the statute. No question seems to have been raised as to the description.

In *Allter* v. *Village of St. Johnsville*, 130 App. Div. 297, the description contained in the sidewalk assessment was simply "N. Division street," which was held insufficient.

In *Schermerhorn* v. *Albany Syndicate*, 93 Misc. Rep. 597, the assessment was as follows: "834, Schermerhorn Lucy J. estate of, Main St., H. and lot, value

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$2200. Village of Castleton," which was held insufficient.

In *Zink* v. *McManus*, 121 N. Y. 259, the description contained in the assessment in question was as follows: " feet front 872, feet deep 290, N. line, name of street Military R, side E. Feet 918.60, course N. Street Hertel Avenue." The court held that this description was insufficient as appeared by comparison of the description contained in the comptroller's conveyance to that contained in the complaint, the court saying: " it is plain that they do not agree, and that no sufficient words or suggestion is contained in the former identifying or calling attention to the latter. A reasonably accurate designation or description of the land assessed and sold is necessary in order to give validity and effect to the conveyance. There are but two boundary lines contained in the description of the lands in the comptroller's deed. No land is actually inclosed by it. It is impossible, from the description, to ascertain the form or shape of the lot or how far, either to the west or to the south its actual boundaries extend. It is impossible, as it seems to us, to locate or identify the lands thus described with any degree of certainty."

In *Sheldon* v. *Russell*, 91 Misc. Rep. 278, the assessment in question was upheld and was as follows: " Names of taxable persons, Tarbell, Fred, et al., Quantity and Statement, Description, Ward 3, section ——, block 147, No. 210 Street, N. Clinton, acres 14/1000." It appeared that the land attempted to be assessed was described in the deed to plaintiff as situate in the village (now city) of Olean, county of Cattaraugus and state of New York, and described on a map of said village, and described by T. J. Gooseline, Esq., as lots Nos. 4 and 5 in block 146. It also appeared that there was another map of the city of

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Olean known as the Blakeslee map filed in the county clerk's office upon which the property in question was located in block 147. When the city authorities numbered the residences in pursuance of an ordinance, lots 4 and 5 of the Gooseline map became No. 210 North Clinton street.

The Appellate Division affirmed this decision (173 App. Div. 991) without opinion. A dissenting opinion was filed by Lambert, J., in which he said the description contained in the assessment could not be helped out by referring to the Blakeslee map, because it was not referred to in the description, and that therefore the description of the premises sought to be taxed had no definiteness in its reference to block 147. He then said: "The boundaries of the lot are not indicated and there is nothing to show any location of the premises, except the reference to street number. I am not aware that any court has ever approved a reference to a street number as a sufficient designation of premises sought to be taxed or conveyed. Different municipalities adopt different street frontages in determining the numerals to be applied to different properties. In one municipality each twenty-five feet may be assigned a number; in another each fifty feet, and even these measurements are usually varied to correspond to some extent to the buildings upon the premises. In any event, the reference to street number does not indicate anything of the precise location of the boundaries of these lots and from the description in the assessment roll alone it would be wholly impossible for any person to determine just what lands were sought to be taxed."

The description set forth in this case in the assessment roll contains much more than is shown by the assessment in the case at bar. The ward, section and block and the quantity of land are set forth, as well as

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the street number. It appears from an examination of the opinion rendered at Special Term that the assessors in using the block No. 147 referred to a well-known and duly authenticated map in general use, which was on file in the county clerk's office and used by the city authorities, and the court states in its opinion that under such circumstances "the conclusion is readily reached that the owners could not have been misled as to the fact of their property having been assessed, nor prevented by the manner of the assessment from discovering the existence of such assessment." It is not clear that the court at Special Term held that the designation of the property assessed by street number was a sufficient description, nor can it be said that the affirmance by the Appellate Division without opinion (173 App. Div. 991) is an authority for that proposition.

I do not find that the exact question presented here has ever been passed upon, but it seems to me that the opinion expressed by Judge Lambert in his dissenting opinion in the *Sheldon* case is correct when he says: "The reference to street number does not indicate anything of the precise location of the boundaries of these lots and from the description in the assessment roll alone it would be wholly impossible for any person to determine just what lands were sought to be taxed." In my opinion, if the assessment by house number was in fact held to be sufficient in the *Sheldon* case at Special Term and in the Appellate Division, such decision is in conflict with the decision of the Appellate Division in the second department in the *Lawton* case and the Court of Appeals in *Matter of Application of N. Y. C. & H. R. R. R. Co.*, 90 N. Y. 342, 349.

In the *Lawton* case the court said: "It is essential to a valid assessment that there should be a statement of the quantity of land or a description of the same

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which will enable all persons interested to point out and designate the particular land which is the subject of assessment." See, also, *Rupert* v. *Village of North Pelham*, 139 App. Div. 302, where the same requirement was laid down and where in the course of the opinion Justice Jenks quoted from Cooley on Taxation (2d ed., p. 205), where the author says: "The purposes in describing the land are: First, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and third, that the purchaser may be enabled to obtain a sufficient conveyance."

I do not think it could be seriously contended that a reference to land conveyed as house and lot No. 33 Woodbury street would be a sufficient description in a deed conveying the property.

Judgment for the plaintiff canceling the assessments in question and the subsequent proceedings of the city based thereon.

Judgment for plaintiff.

Matter of the Application of THE BRONX PARKWAY COMMISSION, Petitioner and Plaintiff, to Acquire Title to Lands of WATSON REALTY COMPANY and THE GARTH ESTATES, Impleaded with Others, Defendants. No. 4.

(Supreme Court, Westchester Special Term, March, 1917.)

Condemnation law — question of ownership between conflicting claimants — Code Civ. Pro. § 3357, et seq.

In a condemnation proceeding, which is purely statutory, the court possesses only such jurisdiction and powers as are expressly conferred by statute, and such other incidental powers as may be necessary to effectuate the scheme of the statute.

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Under the condemnation law (Code of Civil Procedure, § 3357 *et seq.*), which does not expressly authorize such procedure, the question of the ownership, as between conflicting claimants, of property to be condemned, cannot be determined upon a motion before the commissioners of appraisal have made their award; such a method of trial is not a necessary incident to the power conferred upon the court by the condemnation law.

MOTION by Garth Estates for referee to determine ownership and for an injunction pending such determination.

Theodosius F. Stevens, for petitioner.

Erwin, Fried & Czaki (Joseph S. Wood, of counsel), for Garth Estates.

J. Homer Hildreth, for Maria L. Watson, claimant.

YOUNG, J. Upon this motion the Garth Estates, one of the defendants above mentioned, asks to have the court, or a referee appointed for that purpose, hear and determine the question of ownership of certain property to be condemned, known as parcel 5, sheet 16, as to which there appear to be conflicting claimants, and for an injunction restraining proceedings before the commissioners until it be decided who the true owner is. Ordinarily the question of ownership would not be raised at this point or be deemed important, but would be determined by the court or referee after the award of the commissioners was made in a proceeding brought for the purpose of determining who was entitled to the award. But it is the contention of the Garth Estates that the question of ownership should be decided before the award is made, for the reason that if it is held to be the owner of parcel 5 then that parcel and others, which the Bronx parkway commission seek to condemn, are part of a large tract owned by it, and it will be entitled not only to damages for the

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taking of parcel 5 but to the consequential damages to the remainder of the tract, and that as the court has power under the statute to determine conflicting claims after an award has been made and paid into court it has equal power to determine such conflicting claims of title before the commissioners make their award, where such a determination is necessary to enable them to award just compensation. No authority in this state is cited by counsel to support this contention, but it seems that such practice obtains in Illinois, and my attention has been directed to three cases decided by the court of last resort of that state upholding this practice. *Chicago & M. Elec. R. Co.* v. *Diver,* 213 Ill. 26; *Metropolitan West Side El. R. Co.* v. *Eschner,* 232 id. 210; *Chicago & N. W. R. Co.* v. *Miller,* 233 id. 508. The statute relating to condemnation in Illinois is not substantially different from that in this state. Hurd's R. S. Ill. chap. 47. It provides for the commencement of the proceeding by petition and prescribes the facts which must be alleged, the parties and method of service, and for trying the question of damages before a jury, and for a judgment or order upon their report. It does not, however, provide for any answer to the petition and such questions as are raised in this state by answer are, under the practice in the Illinois courts, presented by objection upon the return day. It does provide, however, for the filing of a cross-petition by a person not made a party who claims to be an owner or interested in the property taken or damaged. In practice, however, it has been held that it was proper for the court to direct by order that all the defendants claiming title file cross-petitions and have the question of title determined prior to the impaneling of the jury. *Chicago & N. W. R. Co.* v. *Miller, supra.* Indeed, it is well settled in that state that all preliminary questions of title, etc., should be thus determined

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prior to the calling of the jury, and that the jury had no power to pass on such issues. The statute also contains a provision that the compensation may in all cases be paid to the county treasurer, to be paid by him to the party entitled, etc., and it was held in *Metropolitan West Side El. R. Co.* v. *Eschner, supra,* that although the parties had neglected to present such questions of title at the proper time the irregularity would be regarded as waived, and the court should order the compensation paid to the county treasurer and require the defendants to present their respective claims thereto to the court.

The right of eminent domain is a purely legislative power, and it can only be exercised pursuant to legislative authority. It is well settled in this state that: "The stringent character of the power of eminent domain demands that the methods of procedure prescribed for its exercise shall be strictly if not inflexibly followed." *Bell Telephone Co.* v. *Parker,* 187 N. Y. 299, 303; *Schneider* v. *City of Rochester,* 160 id. 165, 172. A condemnation proceeding is a statutory proceeding and the court possesses only such jurisdiction and powers as are expressly conferred by the statute, and such other incidental powers as may be necessary to effectuate the scheme of the statute. An examination of our condemnation law (Code Civ. Pro. chap. 23, tit. 1) does not disclose any express authority for such procedure as the Garth Estates invoke here.

So far as statutory provisions are concerned, however, I am unable to see that the Illinois statute grants the courts of that state any greater powers than are given to our courts by the Code. The powers exercised by the Illinois courts in relation to the questions referred to above have no express statutory authority, and the courts there have no greater incidental powers than are possessed by our Supreme Court.

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But the courts of this state, although this precise question has never been presented or passed upon in this form, seem to construe the condemnation law somewhat strictly.

It is well settled that commissioners of appraisal have no authority to determine a disputed title to land and that it is not the legitimate province of a condemnation proceeding to take up such questions. *New York C. & H. R. R. R. Co.* v. *Mathews,* 144 App. Div. 732. But where the land proposed to be taken formed part of a tract it has been held that title to the part not taken might be proved before the commissioners for the purpose of estimating consequential damages and that such proof was irrelevant on the preliminary application to appoint such commissioners. *Village of Babylon* v. *Bergen,* 68 Misc. Rep. 433.

It has also been held that proceedings by a municipal corporation nominally to acquire an easement for a sewer were inappropriate to try the title to the lands affected or to determine the question of the municipality's existing right to the easement (*Matter of City of Yonkers,* 117 N. Y. 564); and that a municipality by commencing proceedings to acquire land for street purposes admits the landowner's right, and can make no claim of dedication thereof to public use as a highway. *Village of Olean* v. *Steyner,* 135 N. Y. 341; *Village of Medina* v. *Graves,* 113 N. Y. Supp. 52. In *Matter of City of Buffalo,* 148 App. Div. 384, it was held that the report of condemnation commissioners will not be refused confirmation because they may have exceeded their authority in determining conflicting claims of title where all parties in interest during the entire hearing made no objection to the determination of such issues by the commissioners. In *City of Geneva* v. *Henson,* 195 N. Y. 447, the petition alleged

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that the city was the owner in fee of the premises in question and that Henson had certain easements. The latter denied the essential allegations in the petition and also alleged that he was the owner in fee of the premises. The issues raised by Henson's answer were tried before a referee by consent, and the Court of Appeals, while holding that such an issue could not ordinarily be decided in that way, held that as the proceeding was pending in the Supreme Court, with its general jurisdiction, the parties had a right, if they so desired, to submit such an issue in connection with the other issues to the determination of the referee, instead of seeking the decision of the question at some other time or by some other tribunal.

The last cited case is similar in principle to the case at bar, because it was essential there, as it is here, that the question of title should be determined before the commissioners fixed the compensation. In other words, in that case, if the city was the owner of the fee and the defendant had only an easement the compensation to be awarded to him would be very different from what he might recover were it determined that he owned the fee. So here, if the Garth Estates own parcel 5 the compensation which the commissioners must award may include consequential damages to the remainder of the tract and therefore be much larger than if the title to parcel 5 is in some other defendant or defendants. It should be noted also that although the issues raised in the *Henson* case were directly between plaintiff and defendant, and so literally within the provisions of section 3367, the Court of Appeals condemned the practice, saying: "Such petitioner ought not to be allowed, by alleging in a defendant a lesser estate or title than he really possessed, to compel such owner to set up his true title and interest and thus contest in the proceeding ques-

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tions of which he otherwise might be entitled to have a trial by jury." P. 455. It is true that the actual questions decided by the above authorities are in substance simply that commissioners of appraisal cannot try disputed titles and that such an issue *between the petitioner and a defendant* cannot be raised by answer, and tried in the proceeding, except by consent. It has not been actually decided that conflicting claims of title *between co-defendants* may not be determined in the proceeding. Indeed under section 3378 the title of conflicting claimants to an award paid into court may be so determined by the court or a referee, and without a jury trial. Referring to that provision of our Code, the Court of Appeals in the *Henson* case pointed out as a distinction from the case before it that such provision "both on its face and in the light of the practice under it relates to *defendants* who set up conflicting claims *amongst themselves* and does not relate to a contest *between the plaintiff and defendants* as to the title to the property." P. 455. Of course, the issue raised between conflicting claimants to an award is in reality an issue of title because the right to the award depends upon the title to the land condemned.

It would seem then that the question is narrowed down to this: May an owner of property be compelled to try a disputed question of title with co-defendants in a summary way in a condemnation proceeding without a jury, and without any express provision by statute requiring such method of trial? In other words, is such a method of trial a necessary incident to the power conferred upon the court by the condemnation law?

That the Garth Estates are entitled to some relief from the situation in which it finds itself is plain, and to prevent circuity of action I would be inclined to

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hold that the question was not one of jurisdiction, but that the court without express statutory authority might determine the question of title before the commissioners make their award, and stay proceedings for that purpose, upon the theory that this court, being one of general jurisdiction, was authorized not only to take the steps specifically provided in the condemnation law, but such other incidental proceedings as might be necessary to a just determination of the award to be made. But a careful reading of the authorities which I have cited, as well as others, convinces me that such a determination of this motion would be contrary to the policy indicated by our court of last resort, and I feel constrained therefore to rule that the Garth Estates cannot obtain relief in the manner sought. It seems to me that it can only be obtained in some appropriate form of action. I have reached this conclusion with reluctance, because I feel that the court should have power to adjust in a condemnation proceeding all questions which may arise therein, and the decision of which is necessary to attain the object sought by the statute, — the speedy award of just compensation for lands condemned. Parties to such a proceeding ought not to be delayed in the attainment of the object sought in order that some necessary question may be tried out in an independent action or proceeding. This delay is strikingly illustrated in the case at bar, where it is apparent that an action in equity must be brought and the prosecution of this proceeding enjoined pending the determination of the title, without, so far as I am able to perceive, any more substantial advantage to the parties than might be obtained by a speedy determination of the same question in the proceeding itself, and with no other result than a vexatious delay of the final award in this proceeding.

In the view I have taken of this motion, it is unneces-

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sary to determine the objections raised by the petitioner and the respondent Watson, that notice of this application has not been given to other defendants claiming to be owners of parcel 5, and that the allegation of ownership in the Garth Estates is too general to furnish a basis for an injunction or stay. I should, however, point out to the applicant that it could not have been successful upon this application, in any event, without notice to the other defendant owners, and that even had I been able to hold that the procedure invoked was proper I should have been compelled to deny the motion, with leave to renew on proper notice. The other objection is also entitled to some consideration, and it may be doubted whether the bare allegation of ownership, without proof to support it, is sufficient to justify injunctive relief, as against parties showing an apparent record title. In other words, to obtain such relief, a party must show a clear right upon which to base such a remedy. The motion is denied.

Motion denied.

Matter of the Petition of HENRY C. VAN CLEEF, as Executor of the Will of JOHN S. VAN CLEEF, Deceased, to Render and Settle His Account of the Acts of Said JOHN S. VAN CLEEF, Deceased, as Trustee of the Trusts Created in and by the Will of DANIEL A. ROBBINS, Deceased.

(Surrogate's Court, Kings County, March, 1917.)

Wills — devise contained in — construction of — meaning of "survivors and survivor of my children and the lawful issue of such of my children as shall be dead."

Where a devise to each of testator's four daughters of one-fourth of his estate provided that on the death of one without

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issue her share should go to the "survivors and survivor of my children and the lawful issue of such of my children as shall be dead," and at the death of a daughter without issue testator had a daughter living and a son of a deceased daughter with issue and the issue of a deceased son of said daughter, the issue of the deceased daughter, though of two generations, take in equal division her share, one-half of the property devised, *per capita*.

PROCEEDING upon the judicial settlement of the account of an executor.

Cullen & Dykman (Francis L. Archer, of counsel), for accountant, and for Brooklyn Trust Company, as successor trustee of the trust created for the benefit of Caroline S. Dakin.

Harry A. Redmond, for Georgietta H. Maxfield.

Percy S. Dudley, for the Brooklyn Trust Company as guardian of Louis, Jean and Edna Van Cleef.

James M. Gray, for Marion Van Cleef Warner.

Charles J. McDermott, for Henry C. Van Cleef, as sole surviving executor of Julia Amelia Hicks, deceased.

D. A. Marsh, for Sally N. Gildersleeve, as administratrix of Frank Van Cleef, deceased.

KETCHAM, S. The executor of John S. Van Cleef is accounting for the acts of his decedent as trustee under the will of Daniel A. Robbins. This will nominated three trustees of whom Mr. John S. Van Cleef was the sole survivor.

The testator had four children, all daughters, who lived at the date of the will and survived his death.

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To each of these daughters he devised one-fourth of his estate for her life, with remainders as will presently appear. These gifts were contained in four paragraphs identical in their language, except that in each one daughter only was named as the primary beneficiary. There was a subsequent paragraph qualifying these four and containing a devise in trust to pay the income in each instance to the daughter for her life.

One of the four paragraphs, under which distribution must now be made, is as follows:

"*Fifth.—I hereby give and bequeath unto my daughter*, Caroline Eliza, for her sole and separate use, free from the control of any present or future husband, the net income of one quarter of my estate, for and during the full end and term of her natural life, and upon her death, I give devise and bequeath the said one quarter of my estate to the lawful issue of the said Caroline Eliza, and in default of such lawful issue, I give devise and bequeath the same to the survivors and survivor of my children, and the lawful issue of such of my children as shall be dead."

Since the testator's death, Caroline, named in the quotation, has died without issue. Two other daughters, Mary Augusta and Emma, have died. Mary Augusta left two sons, and one son has died leaving a child still living. The other lives, having three children. Emma has died without issue. The remaining daughter of the testator, Georgietta, survives.

Upon the decease of Caroline without issue it becomes necessary to apply to the circumstances detailed *supra* the phrase, "and in default of such lawful issue (of Caroline) I give, etc."

The conclusion has been reached that the will requires distribution, one-half to Georgietta, the surviving daughter, and one-half to the issue of Mary

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Augusta, and that among themselves the issue of Mary Augusta, though of two generations, take *per capita*.

Any other interpretation, even though not forbidden by the will, would at least be contrary to the natural desire of the testator. While, of course, the task is to discover the intention which is shown in the will, inquiry as to the subjective purpose which a rational will maker would by presumption have indulged may greatly help the construction of the language which he employed. Among the circumstances and influences which shaped this will, and which now tend to its fair understanding, are the relations of the testator to his family, the wishes which, in reason, he must have maintained as to the effect of his last provision for their welfare, and the sense of justice which, shared by him with all mankind, may be presumed to have turned his mind from a fantastic disposition of his estate. None of these things can be permitted to overcome a distinct expression in the will but any of them may avail to resolve uncertainty.

Unless, therefore, the court is constrained to the contrary, it will be inevitably assumed that the decedent did not intend a capital division among all his surviving children and all the issue of his deceased children. This, under the circumstances presented, would result in the payment of the fund equally to the surviving child of the testator and the persons constituting the issue now living of his deceased child. Such issue are five and among them are a daughter, and a parent and his three children. In a *per capita* distribution the surviving daughter would take only one-sixth, while among the five, all of a stock standing toward the testator in the like relation as the living daughter, would receive five-sixths.

The interpretation which would permit such result would impose upon the testator's language another

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Misc.] Surrogate's Court, Kings County, March, 1917.

and in a degree more abhorrent meaning. If, at the time of distribution, the surviving child should herself have many children, then by the undoubted force of the will, none of the children of the surviving mother would take any share of the fund, while the children of another mother, and perhaps of two other mothers, would by the decease of their parent or parents take all but a paltry fraction. Thus, if a surviving daughter with five children was confronted by ten children of her deceased sisters, the ten would absorb ten-elevenths of the fund while the surviving daughter would be cut down to one-eleventh, and her children, though not strangers to the testator's solicitude, would take nothing.

Again, before there is imposed upon the words in question an intention to produce a capital division, regard may perhaps be had to the possibility that upon the death without issue of the last daughter to die there might survive her one niece by one of her sisters and many children of her other two sisters. A division by which one stock would receive one-fifth or one-tenth of the fund, while four-fifths or nine-tenths were accorded to stocks of equal degree, would have been intolerable to a normal mind if this possibility were appreciated.

The will fairly indicates that this testator's thoughts were strongly determined toward the recognition of the stocks of his offspring and the continuance so long as possible of each of these gifts in the line of the first taker. Upon this instinct, the argument is based that the gifts upon the death without issue must have been intended *per stirpes*. The force of the suggestion cannot be wholly denied but it is not controlling.

That the remainder now awaiting distribution was contingent may be asserted without discussion. That the future gifts to issue are primarily to be held to

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intend all descendants and to vest a capital share in each of them, not excluding a parent and his child, is fundamental. An exception, which has almost outgrown the stem upon which it was grafted, is that the principal rule "yields to a faint glimpse" of a different intention in the will. In the search for the "faint glimpse" judicial zeal may often have seen a light in the will which never else were seen on land or sea. Such occasional extravagance has been but an amiable perversion of a sound impulse, for the main rule has often destroyed the actual purpose of the testator.

Resentment of the present rules has taken form in an act now before the legislature providing that the word "issue" in cases now subject to these rules shall be construed to mean issue *per stirpes* unless a contrary intention appears in the will.

But the subordinate rule has been applied with just composure and restraint, and the "glimpse" fairly found in a recent case decisive of the present question. In *Matter of Farmers' Loan & Trust Company (Will of Wallach)*, 82 Misc. Rep. 330, the testator divided his estate into seven parts, corresponding to the number of his children. For each of the sons he created a trust of one of these parts until the beneficiary should attain the age of thirty years, when the principal was to be paid to him. For each of his daughters he devised the proceeds of a seventh part for her life. He then provided that upon the death of any daughter leaving issue the principal of the trust for her should be paid to such issue; that upon the death of a son within the age of thirty, leaving issue, the principal of the fund for such son should be "paid over and distributed among the issue equally share and share alike," and that upon the death of a son under the age of thirty years without issue the principal of the trust for him

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should be "paid over and distributed among his (my) surviving children and the issue of any deceased child. There followed the paragraph construed in the case cited, viz.: "In the event of the death of any or either of my said daughters without issue, the share of such deceased daughter shall be distributed among my surviving children and the issue of any deceased child."

One of the daughters died without issue after the testator's death. Rehearsing these facts Mr. Surrogate Fowler says: "It is apparent from the will now before me that the testator had in mind primarily the interests of his own children as a class, and that each of them should benefit equally *inter se* in his estate. In the case of the death of any one of them, being a *cetstui que trust,* testator directed that the corpus of the trust estate should go to the issue of the one so dying, and failing such issue be distributed among his own surviving children and the issue of his deceased children."

The learned judge further holds that the portion falling to the respective issue of any deceased child of testator is to be distributed among such issue *per capita* and not *per stirpes.* The parallel of fact between the case at bar and the case cited is not broken unless it be by the provision there found that the issue designed to take with the surviving children are the issue of "any" deceased child.

It will be seen as this discussion proceeds that the gift in the present case "to the lawful issue of such as shall have died" was necessarily equivalent to a gift to the issue of any one of the testator's children who should have died at the time of distribution.

The determination in the case cited is well sustained by the authorities of England and of the states of this Union, and in their citation it will generally appear that a gift to "their issue," "their children," or

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"their descendants" has been interpreted to mean a gift to the children, issue or descendants of any single person of the original class who shall have died.

In *Arrow* v. *Mellish,* 1 De Gex & Smale, 355, the gift was for life to persons nominated with the addition "and at their deaths to go equally share and share alike to their children." Bruce, V. C., said: "In this gift the words 'their children' must mean their respective children."

Burrell v. *Baskerfield,* 11 Beav. 525, required construction of the words "then the whole of the remainder of my property is to be divided share and share alike to my aforesaid twelve first cousins and their children." This provision supervened upon a gift of the whole residue to the testator's wife for life. Lord Langdale, Master of the Rolls, confessed to misgivings as to the share of the children of a first cousin who, though named in the will, was then known to the testator to be dead, but he held, without uncertainty as to the children of the other cousins, that if any cousins died leaving children in the lifetime of the tenant for life the vested interest in the cousin was divested and the children of such deceased cousin became entitled by way of substitution.

In *Wood* v. *Robertson,* 113 Ind. 323, there was a devise to a wife for life, with the direction: "At her death it is my will that whatever remains of my estate * * * shall be equally divided among my children then living and the descendants of such as may be dead, share and share alike." Affirming that a division *per stirpes* among the children and descendants was intended, the court pursues the argument outlined by this court *supra,* saying: "If this be not true, then, if there were four children and ten grandchildren, the ten grandchildren, although all the children of one child of the testator, would take more than twice as much as

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the four children." The decision was that the beneficiaries took *per* stirpes and not *per capita,* viz., that the children living should share alike and that the children or descendants of the dead should take the share which would have fallen to the father or ancestor had he been alive.

The case last cited was followed by the same court in *Henry* v. *Thomas,* 118 Ind. 23. There the testatrix provided that her property should "be divided equally between my brothers and sisters and the children of deceased brothers and sisters, and the brothers and sisters of P. J. B., her deceased husband, and the children of deceased brothers and sisters." The will contained no other provision to indicate the intention of the language quoted. The court found that the manifest effect was to give to the children of each deceased brother and sister of the testatrix and her husband the same share which their parent would have had.

In *Crosier* v. *Cundall,* 99 Ky. 202, the like construction was given to a will in which after a devise to two daughters "to them and their heirs forever" there was the provision in case of the death of either daughter without issue: "Then such portion of my estate as is devised to them shall revert back to and be equally divided between the rest of my children and the children of those who are dead."

Gerrish v. *Hinman,* 8 Ore. 348, concerns a gift over after a life estate in these words, unqualified by any other expression, "I give * * * to each of my living children and the children of my deceased daughters alike" and it is there held that the division intended was *per stirpes* among the testator's surviving children and the children of deceased daughters.

It is plain from these suggestions that when the words descriptive of one class of possible takers and

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the words indicating their children, issue or descendants, as possible partakers, are coupled by " and " and not " or " the result must be the same as if the conjunction " or " were employed. We must learn from them that the phrase now in dispute must be read as if it were " to the survivors and survivor of my children or (not ' and ') the lawful issue of such of my children as shall be dead."

It is strangely significant that the testator in the case at bar establishes by his will that by the word " and " when used by him throughout the instrument in any relation at all like that in which it appears in the phrase under construction he means to give it nothing but the sense of " or " and that in this particular phrase it has no other force. When he means to give to his children, who survive, he speaks of " the survivors and survivor " of them. This is four times repeated. When he makes his devise in trust it is to his executors and the " survivors and survivor of them."

In these five instances it is impossible to give to the word a conjunctive sense. It gives forth no meaning unless it be to contrast and to disjoin the concept contained in the words with which it is associated. There never could be together both survivors and a single survivor, and the language falls into delirium unless it intends the survivors, if any, " or " if none, the sole survivor.

Cases already cited indicate that even without a context imposing a distributive sense upon the word " and " in the relation which we are discussing, the alternative gift is to the issue, etc., of such one of the primary objects as shall have died. Other cases where the word was " or " must control the present argument if it be accepted that in the will before us its equivalent was intended. *Gowling* v. *Thompson,* 19 L. T. Rep. (N. S.) 242; *Matter of Sibley's Trusts,* 5 L. R. Ch. 494;

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Timins v. *Stackhouse*, 27 Beav. 434; *Congreve* v. *Palmer*, 16 id. 435; *Guild* v. *Allen*, 28 R. I. 430.

The phrase "my children (or) (and) the lawful issue of such of my children as shall be dead" cannot be distinguished from the words "my children (or) (and) their issue." "Their issue" in the latter form is held to be distributive and to intend the issue of any one who shall die, in each of the following cases cited *supra*: *Arrow* v. *Mellish*; *Matter of Sibley's Trusts*; *Gowling* v. *Thompson*; *Congreve* v. *Palmer*; *Timins* v. *Stackhouse*; *Burrell* v. *Baskerfield*; *Guild* v. *Allen*; as well as *Matter of Hutchinsons' Trust*, 21 L. R. Ch. 811.

In the phrase now considered, "to the survivors of my children and the issue of such as shall be dead," there is a stronger flavor of distribution in the words "issue of such" than can be extracted from the words "their issue." It must be that the issue of such only as shall be dead is intended. It could not be the issue of such two or more of my children as shall be dead.

It has been gravely argued by judges that "their issue" and like phrases when applied to a group of brothers and sisters must mean the separate issue of any one or another brother or sister, for issue of which two of them would be parents is inconceivable. If then the gift be properly considered to be to the issue of any child deceased it is revealed as the thought of the testator that the subject of the gift is the share which a single parent would have taken if living. There is not only the gift in common fractional shares to all children, but there is also, in case of the death of one, a gift to the issue of that one by substitution of the share which otherwise would have belonged to his parents.

But the devise though *per stirpes* as between the sur-

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viving child and the issue of each deceased child must vest among such issue *per capita*. *Matter of Farmers' Loan & Trust Company, supra; Gowling* v. *Thompson, supra; Matter of Sibley's Trusts, supra; Guild* v. *Allen, supra.* The decree should embody the conclusions herein stated.

Decreed accordingly.

Matter of the Petition of MINNIE G. CRAWFORD, to Render and Settle Her Account as Executrix of the Will of CHARLES L. CRAWFORD, Deceased.

(Surrogate's Court, Kings County, March, 1917.)

Wills — devise contained in — power of sale — gifts — when wife entitled to residuary estate.

Where testator devised and bequeathed all the rest, residue and remainder of his estate to his wife with the express wish and desire that she use and enjoy only the income and not dispose of any portion of the principal by will, except to their daughter, the wife, who was appointed executrix with a discretionary power of sale over testator's real estate, takes an absolute gift.

PROCEEDING upon the judicial settlement of the account of an executrix.

Cullen & Dykman (Francis L. Archer, of counsel), for the executrix.

Abram Greenberg, for Mary C. Cook.

KETCHAM, S. The settlement of this account depends upon the meaning of the following paragraph of decedent's will:

"*Fourth.* All the rest, residue and remainder of my estate, both real and personal and wheresoever situ-

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ated, I give, devise and bequeath to my wife, Minnie G. Crawford, with the express wish and desire that she use and enjoy only the income thereof, and that she do not dispose by Will of any portion of the principal thereof to any one except my said daughter, it being my desire that the unexpended balance of the principal of the above devise and bequest shall become the property of my daughter upon the death of my said wife."

By subsequent paragraphs the wife is appointed as executrix and is given discretionary power of sale over the testator's real estate.

The wife contends that the 4th paragraph contains an absolute devise to her. Against this, the daughter's only claim is that the devise is subject to a trust in her behalf pursuant to which she is entitled to the unexpended balance of the principal estate upon her mother's death.

Gifts qualified by words of desire have been found to be subject to a trust or charge, but no case has come to the attention of the court in which such finding has been impressed upon language contemplating a use or application of the subject of the gift during the life of the devisee. *Phillips* v. *Phillips,* 112 N. Y. 197; *Collister* v. *Fassitt,* 163 id. 281. See *Post* v. *Moore,* 181 id. 15, distinguishing the *Collister* case.

The theory of an absolute gift is not encouraged by the power of sale, since no such power would be necessary if an estate in fee for the wife was intended, but the provision containing this power, even though useless, is not repugnant to the express devise with which the 4th paragraph opens. It may not agree with it but it certainly does not contradict it.

The exhortation to the wife that she use and enjoy only the income and that she do not dispose of the principal by will to any one except the daughter, does not cut down or impair the gift nor is it cut down or

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impaired by the expression of a desire that the unexpended balance shall become the property of the daughter upon the wife's death.

The gift once made to the wife in clear terms is followed only by precatory suggestions wholly consistent with the gift. There are many cases in which like gifts, though qualified by the testator's wish, have been declared absolute. While those have not dealt with language precisely like that of the will now under examination, many of them arose upon wills more hostile to the theory of an absolute devise than is the instrument at bar. *Roseboom* v. *Roseboom,* 81 N. Y. 356; *Clarke* v. *Leupp,* 88 id. 228; *Campbell* v. *Beaumont,* 91 id. 464; *Matter of Gardner,* 140 id. 122; *Benson* v. *Corbin,* 145 id. 351; *Post* v. *Moore,* 181 id. 15; *Matter of Griffin,* 75 Misc. Rep. 441. The wife is entitled to the residuary estate.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of PHOEBE A. D. BOYLE, as Executrix and Trustee, and WILBOR F. RANDALL, as Administrator with the Will Annexed and Trustee under the Last Will and Testament of JOHN BOYLE, Deceased.

(Surrogate's Court, Kings County, March, 1917.)

Trustees — accounting by — trusts — wills — what disbursements by trustee chargeable to income.

The rule is that taxes, repairs and other items strictly for the preservation of the subject matter of a trust are to be paid from the income unless it be exonerated by the expression or intimation of the will.

The disbursements of a trustee for premiums upon a bond given by him pursuant to the decree of his appointment and for the rent of a safe deposit box leased under the direction of the court are chargeable to income.

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Misc.] Surrogate's Court, Kings County, March, 1917.

PROCEEDING upon the judicial settlement of the account of executors and trustees.

Strauss, Reich & Boyer, for accountants.

Benjamin H. Newell, special guardian of John Boyle Bell, an infant remainderman.

Lawrence S. Coit, special guardian of Dorothy Hortense Elger, an infant remainderman.

KETCHAM, S. This accounting presents the question whether the disbursements of a trustee for premiums upon a bond given by him pursuant to the decree of his appointment and for the rent of a safe deposit box leased by him, under direction of the court, are chargeable to the income, which is payable to a beneficiary for life, or to the principal which is devised in remainder.

The rule as to taxes, repairs and other items strictly for the preservation of the subject of the trust is that they are to be paid from the income, unless it be exonerated by the expression or intimation of the will. *Spencer* v. *Spencer,* 219 N. Y. 459, and cases cited at page 465.

Just expenditures made to assure the safety of the securities of a trust do not differ from ordinary repairs upon real estate, expenses of watchman or caretaker or other outlays solely made to keep the premises substantially as they are.

One to whom personal property is bequeathed for life is required to give security for the safe delivery of the property to the remainderman. None can doubt that the legal life tenant in such case must bear the expense attending the giving of such security. The duty of the trustee to pay taxes and repairs from the

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income has been likened to the duty of the legal life tenant in the cases from which the rule *supra* is taken.

While no authority is found expressly relating to items such as are herein involved, the present question seems to fall within the reason and, therefore, the control of the practice approved in the cases to which reference has been made.

The surrogate is informed that the surrogates of New York county hold items such as those presented in this case to be chargeable upon income, although the subject has not been determined upon argument before them.

The will at bar is silent as to the disposition of these charges or any of like nature and they must fall upon the income.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of THE FARMERS' LOAN AND TRUST COMPANY, as Temporary Administrator of the Goods, Chattels and Credits Which Were of EDWIN O. BRINCKERHOFF, Deceased, and of the Account of THE FARMERS' LOAN AND TRUST COMPANY, as Administrator with the Will Annexed of the Goods, Chattels and Credits Which Were of EDWIN O. BRINCKERHOFF, Deceased.

(Surrogate's Court, New York County, March, 1917.)

Terms — technical — meaning of "hotch-pot" — collatio bonorum. Executors and administrators — accounting — advancements — wills — Supreme Court — jurisdiction.

"Hotch-pot" is a technical term in the common law. It is often used in later law to describe what in old customs and in equity and in Roman law is known as collation or "*collatio bonorum.*"

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Where, upon the judicial settlement of the accounts of the administrators of the estate of one who had been judicially declared to be an incompetent after he made his will, it appears that by orders of the Supreme Court certain sums had been directed to be advanced in the lifetime of decedent to his putative heirs at law and next of kin towards their maintenance and support, but such orders failed to conform to precedent by directing the collation of the advances, the surrogate is authorized to infer that the orders of the Supreme Court intend that the principle of *collatio bonorum* shall be applied in the Surrogate's Court upon the judicial settlement and distribution of the estate.

While the surrogate is without power to pass on the validity of said orders he has jurisdiction to give them a construction consistent with precedent and equity.

PROCEEDING upon the judicial settlement of the account of a testamentary trustee and as administrator with the will annexed.

Geller, Rolston & Horan, for temporary administrator and administrator with the will annexed.

Ezekiel Fixman, for Daniel D. Brinckerhoff and others.

Fletcher, Sillcocks & Leahy, for Julia M. Harrison.

Charles W. Booth, for William N. Barlow and another.

Edward F. Moran, for Julia M. Daniels and others.

Cadwalader, Wickersham & Taft, for New York Association for Improving the Condition of the Poor.

Matthew C. Fleming, for American Female Guardian Society and Home for the Friendless.

Stanley W. Dexter, for Five Points House of Industry.

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Jacob H. Shaffer, for Five Points Mission.

Omar Powell, for Daniel L. Cady.

Charles Caldwell, for L. Bell Caldwell.

Samuel L. Gross, for Charles Ver Nooy.

FOWLER, S. From the stipulation filed in the cause it appears that Edwin O. Brinckerhoff, now deceased, in his lifetime was judicially declared an incompetent person on the 23d day of February, 1877, and that he was thereafter and until his death confined in the Bloomingdale Insane Asylum, at White Plains, N. Y. By an order of the Court of Common Pleas for the city and county of New York, dated December 7, 1882, Nathaniel Jarvis, Jr., was appointed committee of his person and estate. By an order of the Supreme Court on the 30th day of March, 1891, Mr. Jarvis was permitted to resign as such committee, and Thomas S. Ollive was appointed committee of the person and estate, and acted as such until the death of the said Edwin O. Brinckerhoff on the 7th day of December, 1915, a resident of the county of New York. Edwin O. Brinckerhoff left a will dated the 2d day of October, 1875. It appears that objections to the probate of the will were filed by various next of kin, but thereafter and by stipulation the objections to probate were withdrawn and all parties consented to the probate of the will, which was accordingly duly admitted to probate on the 7th of March, 1916. The testator was unmarried and left no issue. He left surviving him only the following next of kin: Julia M. Harrison, a sister of the half blood; Daniel D. Brinckerhoff, a brother of the half blood; Elvina D. Clark, a sister of the half blood; Frederick W. Cooper, a son of Angeline Cooper, a deceased sister of the whole blood; Louise B. Arm-

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strong, a daughter of Mary Frances Nesbitt, a deceased sister of the whole blood; William N. Barlow (also known as William Nathan Nash), a son of Emma Nesbitt Nash Barlow, a deceased daughter of Mary Frances Nesbitt, a deceased sister of the whole blood; Robert B. Brown, Julia M. Daniels and Stuart H. Brown, children of Ethelinda R. Brown, a deceased sister of the half blood.

By the will of the testator, Edwin O. Brinckerhoff, one-half of his residuary estate was given to a friend, Edwin R. Livermore, who predeceased the testator, and such one-half of the residuary estate upon the death of the testator passed under the laws of intestacy to the next of kin of Edwin O. Brinckerhoff. The will bequeathed the remaining one-half of the estate to four charitable corporations named in the will. In order to avoid a contest an agreement in writing was entered into by and between all the parties in interest, bearing date February 14, 1916, whereby it was in substance provided that the objections filed to the probate of the will should be withdrawn and that all parties should unite in procuring the probate of the will, which was done. It was further provided in the said agreement in substance that the one-half share of the charitable corporations in the residuary estate should be reduced to one-quarter, the remaining one-quarter so bequeathed to the charitable corporations to be distributed to the next of kin in the same manner as if the testator had died intestate with reference thereto.

It is also stipulated in the submission of facts that during the lifetime of the testator and while he was confined in the asylum several of the next of kin of Edwin O. Brinckerhoff applied to the Supreme Court of the county of New York and obtained therefrom orders directing the committee to pay out of the surplus income of the incompetent person various

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amounts towards their maintenance and support. Copies of such orders are annexed to the agreed statement of facts submitted in evidence. The amounts advanced pursuant to such orders are as follows: Evelina D. Clark, $7,818.33; Louise B. Armstrong, $4,950; Frederick W. Cooper, $4,524.17; Daniel D. Brinckerhoff, $1,100; Julia M. Harrison, $2,325; Angelina Cooper, $2,450. The Supreme Court also allowed, it seems, $210.36 out of the estate of Edwin O. Brinckerhoff for the funeral expenses of said Angelina Cooper. Angelina Cooper predeceased the testator and was not one of the next of kin, and her estate is not now entitled to take any part of the estate of Edwin O. Brinckerhoff.

On the judicial settlement of the account of the Farmers' Loan and Trust Company as the temporary administrator of the estate and as administrator with the will annexed of the above named testator the question arises, What is the proper method of distribution, taking into consideration the sums drawn from the estate of Edwin O. Brinckerhoff by the above named parties pursuant to the various orders of the Supreme Court? The accountant proposes to arrive at the proper distribution by throwing the fund into "hotchpot," as they term it, so that next of kin not having participated in the allowances will receive their shares without reference to any deduction made pursuant to the orders of the Supreme Court. The accountant would, in other words, formally treat the sums advanced by the direction of the Supreme Court as still a part of the estate of Edwin O. Brinckerhoff. Objection is made to this method of distribution by those profiting by the orders of the Supreme Court. Objectants contend that the proposal of accountant that these sums shall be treated as advancements or deducted, or in any way set off, is contrary to law.

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The accountant is indifferent about the result, and the real contention before me is between those of the next of kin profiting by the orders of the Supreme Court and those not so profiting.

Before considering the effect of the orders of the Supreme Court, let me consider for a moment the contention that "hotch-pot" governs here. "Hotch-pot" is a technical term in the common law. It is true, as I shall hereafter explain, that "hotch-pot" is some times used in modern decisions in a secondary sense or as the equivalent of "*collatio bonorum.*" This metaphorical use of technical terms is open to objection. When a contention is made that "hotch-pot" governs a succession, it is necessary to consider what precisely is meant. It will not do to be vague in this court about principles governing successions to estates. It is true that "hotch-pot" is sometimes defined by common-law writers as the blending and mixing property of different persons "in order to divide it equally." But this is not a definition of "hotch-pot" but of the effect of "hotch-pot." "Hotch-pot" itself denotes in law but one single application of a principle.

While the term "hotch-pot" is found in recognized use in England as early as 1292, there was but a single instance at common law where "hotch-pot" was applied. If fee simple lands descended to coparceners and one daughter had previously taken an estate in frank marriage out of the fee simple, she must surrender or bring back her part so given on her marriage or else she was excluded from any further share in the fee simple. This alone was "hotch-pot" at common law. This single instance is certainly a slender foundation for the claim that "hotch-pot" governs in this state at present in successions to personal property. There was, however, in the old law a like principle having a totally different origin and application. In

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successions to personal property in London and in the province of York, before the enactment of the first Statute of Distributions, in the reign of Charles II, any pecuniary advancement to children by their father excluded them from sharing in the surplus of the father's estate unless they brought the advancement into the reckoning. This local custom, quite distinct from the other "hotch-pot," was sometimes denominated "hotch-pot." But "hotch-pot" *strictissimi juris* it was not. We may search the common-law books from end to end, and there will be found no other instance of "hotch-pot" in the country from which by constitutional limitation we derive our common law. There is consequently no foundation for the present assertion that in any other instances "hotch-pot" is a principle of the common-law application to successions to personal property in this state.

In the records of the province of New York prior to independence I have never been able to find any succession where the principle of "hotch-pot" was applied. I think we may safely conclude that in our local common law "hotch-pot" was only applicable before the year 1774 to coparceners where one had taken in frank marriage. That the principle of the customary collation, sometimes called "hotch-pot" was adopted *sub modo* in our first Statute of Distributions I shall presently indicate. If there were no similar and other principle here relevant, the Statute of Distributions in terms would exclude the application of "hotch-pot" to this case now before me.

The Statute of Distributions (22 & 23 Charles II, chaps. 10, 11), which even at present governs successions *ab intestato* in this state, has a singular history. The English statute being passed in 1683 did not *ex proprio vigore* extend to New York. It was no doubt acted on in New York, but when some doubts arose

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about its extension to New York it was expressly re-enacted by our legislature in the year 1774. Laws of 1774, chap. XI. After independence it was constantly re-enacted, either literally or in substance, in the various revisions of our statutes down to and including the Revised Statutes. Laws of 1787, chap. 38; 1 K. & R. 535, 538; 1 R. L. 311; 2 R. S. 96, 87. Sections 98, 99 of the Decedent Estate Law furnish only the latest re-enactment of the statute 22 and 23 Charles II, chapter 10, as I have had occasion to point out in this court in a case affirmed by the Court of Appeals. The English Statute of Distributions contained a provision in relation to advancements no doubt founded on the old customs of London and York. This part of the statute relative to advancements has been sometimes ascribed to *collatio bonorum* of the civilians. It is not improbable that the customs of York and London, strong Roman settlements, may have preserved traditions of the Roman administration, but the weight of authority is that the statute itself was founded on the customs indicated. Its subsequent construction certainly proceeded on that basis. Section 99 of the Decedent Estate Law regulating advancements is the present form of the Statute of Distributions, and it is now invoked on this proceeding. It has received practically the same construction as the old Statute of Distributions. It has no application to advances by others than parents. Consequently it furnishes no rule binding in this proceeding. There is in short no statute which now governs this matter in so far as the sums paid to the recipients under the orders of the Supreme Court are concerned.

If there is any authority for the application of the rule known as collation, or "*collatio bonorum,*" to this proceeding it is to be found either in the system of equity made by the Constitution, according to *Manning*

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v. *Manning*, 1 Johns. Ch. 527, a constituent part of our common law, or else in the common law specially applicable to this court. It becomes necessary therefore to consider, in the first instance, whether chancery affords any precedent for adjusting the equities between the parties to this proceeding and, if so, whether the surrogate is by statute yet become enough of a chancellor to be authorized to apply it. While I have always maintained the jurisdiction and powers clearly conferred on the surrogates, I have never erred by extending the equitable jurisdiction of the surrogate beyond the statutory authority. My own construction of the maxim, "*ampliare jurisdictionem boni judicis*" does not mean that the surrogate is justified in reaching out for equitable powers beyond the clear warrant of law in order to meet the exigencies of a particular case rightfully before him.

Before considering the equitable rules of our own system, if any, applicable to this proceeding, let me advert to the doctrine of *collatio bonorum*, because if there are no equitable rules of our own system applicable, then we may be authorized by the common law annexed to this court to appeal to the civil law. *Collatio bonorum* in the civil law indicates the obligation which that system of jurisprudence ordinarily imposes on the successors to an inheritance to return to the common inheritance gifts which they received from the "estate-leaver" during his lifetime to the extent that they were enriched thereby. Ulpian, 28, 4; D., 37, 6–8; Code, 6, 20; Novel, 18, c. 6; Novel, 97, c. 6. *Collatio bonorum* applied to successions either *ex testamento* or *ab intestato*. It will be observed that *collatio bonorum* applies to all unjust enrichments even if there was not an express understanding with the "estate-leaver" that on the final succession there should be *collatio bonorum*. It applies whether there was or was

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not a testament or, in other words, it does not apply to intestate successions only. If, however, the "estate-leaver" expressly exonerated the taker from *collatio,* the rule did not apply unless such exoneration violated some principle of *legitim.*

It will next be considered whether equity in our system had a jurisdiction like *collatio bonorum* to compel the recipients under the orders of the Supreme Court to bring back the sums paid them. That our equity in its doctrines of advancements, offset, ademption and administration early adapted Roman law principles in substance admits of no doubt. It is true that modern lord chancellors sometimes went further than the civil law, as intimated in *Ellison* v. *Cookson,* 1 Ves. Jr. 100, 104, but in most instances they treated the civil law as a recognized ultimate source of law in chancery matters in case there was no superior local or modern source of law. If the record of the judgments of the clerical chancellors were extant I am persuaded that it would disclose that the civil law of *collatio bonorum* was not only argumentatively authoritative in our equity, but absolutely binding and a source of law. Mr. Justice Story always recognized the force of the civil law in equity, a recognition which helped to give him his admitted supremacy over most of the English chancellors in equitable matters. *E. g.,* Eq. Jurisp. §§ 635, 636, 1440. Modern investigators agree with Story on this point. See citations in Scrutton. Rom. Law and Law of England, chap. 11; Spence Eq. Jurisd. and Kirley Hist. Eq. These opinions of competent commentators are of course valuable only when based on decided causes alone of authority in our courts of justice. That the cases generally support the deductions of the commentators in this instance I do think the fact.

That courts of equity would, in an administrative suit, quite independently of "hotch-pot" or the Statute of

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Distributions, compel the recipients of advances to bring back the sums advanced into the account on a general distribution there can be no doubt. *Edwards* v. *Freeman,* 2 P. Wms. 435; *Phiney* v. *Phiney,* (1708) 2 Vern. 638. In a note to this last case an editor of a century ago states: "It is apprehended a gift of personalty in the lifetime of the intestate to his heir at law must be brought by the heir in all similar cases into 'hotch-pot.'" This is a mere statement of a general principle in equity. He obviously means by "hotch-pot" *collatio bonorum.*

Whether such decisions in equity, and they are many, were founded on the civil law relative to *collatio bonorum* or reached independently by our chancellors is of no consequence. The point is that it was a general doctrine of our courts of equity that sums advanced to those entitled to the succession could be adjusted on equitable principles in the distribution of estates. That the surrogate has now succeeded to the equitable powers in accounting proceedings to adjust the equities of the parties is clear. The statute and decisions both so affirm.

But if equity in our system could not compel those advanced in this instance to bring their advances into the general account on a distribution, the common law of this court, as adopted by the Constitution, now enables the surrogate to decree a *collatio bonorum.* It will be remembered that even in states as far apart as Massachusetts and Nebraska the law regulating the former English courts of probate has been held applicable. In this old state this is expressly so both by legislation and custom. Consequently, if there is now no principle of our own law, common or statute, applicable, the civil law controls in this court, and this is a proper instance to apply it. What is *collatio bonorum* of the civil law I have indicated above. But it is

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quite unnecessary here to rely on this point, and it is therefore not elaborated.

The tenor and effect of the orders of the various justices of the Supreme Court awarding sums out of the estate of Edwin O. Brinckerhoff, an incompetent person, must be considered in this proceding before any determination can be reached. The surrogate has no jurisdiction which would enable him to vary these orders of the court of general jurisdiction in law and equity known as the Supreme Court. In legal theory any Supreme Court justice may look into the validity of any surrogate's order before him judicially (*Matter of Pye,* 21 App. Div. 266); but the converse proposition is by no means true. After the reign of Henry VIII any justice of the King's Bench, no matter who, could inhibit the wisest of the civilians presiding in the courts at Doctors' Commons. On the other hand, the judges at Doctors' Commons could not question the validity of the orders of the common-law courts. The singular tendency of old legal institutions to perpetuate themselves under any successor government displays itself in the legislation of this state continuing the Supreme Court and the revised courts of probates, now known as courts of the surrogates.

But while the surrogate cannot in this proceeding pass on the validity of any orders of the Supreme Court the meaning and effect of its orders, awarding sums out of the estate of the incompetent, which is now the subject of this accounting, can and must be considered. Copies of the orders are annexed to the agreed stipulation of fact submitted to the surrogate. Such orders of the Supreme Court, even if jurisdictional, contain no direction on their face that the sums granted to the various heirs or next of kin should be brought into the reckoning on the final distribution of Mr. Brinckerhoff's estate. In other words, such

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orders fail to conform to the practice of the Court of Chancery both of England and of this state.

Whether the justices of the Supreme Court inherited the jurisdiction of the lord high chancellor to make any such orders at all was a question perhaps for their learned consideration. The learned justices may have overlooked, when making such orders, that the courts of equity of this state inherited only the equity jurisdiction of the lord high chancellor, and not the prerogative jurisdiction exercised by the lord chancellor as the representative and delegate of the king. By the statute "*De Praerogitiva Regis*" the care and custody of lunatics and their estates belonged to the crown, as *parens patriæ,* and the lord chancellor, not as the head of the Court of Chancery, but as an officer of state, was by delegation the official guardian of lunatics, at least after the sixteenth century. The lord chancellor's power to make allowances out of lunatics' estates was not, I think, a judicial power, or, if it was, it certainly rested on very different foundations from that of the Supreme Court justices of this state. That the power of the lord chancellor over lunatics and estates of lunatics was not judicial may be detected from the practice on appeals. If the lord chancellor had acted as a court of equity appeals from his action would have been to the House of Lords, whereas appeals in lunacy always lay to the king in council. But I admit that this question whether his power is judicial or ministerial is rather an obscure point, and there is some language in the old books which might lead to either conclusion. If the power of the lord chancellor was, as I think, a delegation from the king as *parens patriæ,* and not a judicial power, it did not vest in the chancellors of New York at any time, and could not pass to the Supreme Court. It has always been held in this state that the prerogative powers of

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the lord chancellor as the immediate representative of the crown do not vest in the justices of the Supreme Court of this state. *Bascom* v. *Albertson,* 34 N. Y. 584, 590, 592; *Holland* v. *Alcock,* 108 id. 312, 330. But passing this point, important at another time and in another place, let us proceed to consider the practice of courts of equity in making orders for payments to putative heirs out of the estates of lunatics.

In the English Chancery, where the power to make allowances was certainly more extensive, the orders made for allowances out of the estates of lunatics always expressly provided for a *collatio bonorum,* or, in other words, that the sums advanced under such orders should be brought into the final reckoning on the succession of those advanced to the estate of the lunatics. In *Matter of Frost,* 39 L. J. ch. 808, where advances were made out of the estate of a lunatic, it was said: "Of course all sums paid under this order will be brought into account when the shares come to be ascertained." This seems to have been the invariable doctrine in the English Chancery. The sums so advanced must, in other words, be brought into the account of the succession on the principle of *collatio bonorum.* When we come to the chancery practice under our state government after 1775, we find that Chancellor Walworth said that he invariably required the adult children advanced out of the estate of lunatics to give a stipulation that the amounts advanced to them should be brought into "hotch-pot" upon the death of the lunatics. *Matter of Willoughby,* 11 Paige ch. 259. This, it will be observed, was in precise accord with the English practice in Chancery. I have noticed before that "hotch-pot" is often used untechnically for "*collatio bonorum*" and as meaning the same thing. Chancellor Walworth used "hotch-pot" in the sense of collation. In the making of such orders

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for allowances out of the estates of lunatics, I infer that Chancellor Walworth, from his practice of granting such orders, assumed that his power was a judicial power, and he followed Lord Chancellor Eldon in his reasons for the granting of such orders. Lord Eldon assigned as a reason: "That the court would not refuse to do for the lunatic that which it is probable the lunatic himself would have done." *Matter of Whitbread,* 2 Meriv. 99. Any other doctrine would, we must concede, be highly inconvenient in practice, especially where a lunatic has children or a wife dependent on him. The action of that really distinguished chancellor, Chancellor Walworth, in granting any such allowances was perhaps a sufficient precedent for the Supreme Court justices to make allowances out of lunatics' estates, although the real point of doubt seems to have been assumed by Chancellor Walworth or passed by him *sub silentio.* It would certainly have proved inconvenient had Chancellor Walworth denied his power to direct any such advances or allowances out of the estates of lunatics.

This brings me to an important question on the proper construction of the orders of their honors in the Supreme Court, *i. e.,* although such orders failed to conform to the practice in equity, is not a direction for *collatio bonorum* to be implied from the orders themselves? The learned justices in the Supreme Court, I assume, did not mean to give the property of the lunatic absolutely away, in disregard of all established practice or principle. They would have no right to arrogate to themselves any such power. I assume that they did not. They doubtless intended that the advances to those entitled to share in the succession should be on the usual terms; that is to say, that the adult beneficiaries advanced should bring their advances into the final reckoning of the lunatic's

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estate. It is my understanding of the effect of the orders of their honors in the Supreme Court that such orders intend, and must be taken to intend, that the sums advanced under such orders to the adult persons sharing in the succession should be brought into the final distribution on the principles of *collatio bonorum* and in conformity with the established practice. This construction might, I think, be supported also on the equitable doctrine of implied trusts. Any misapplication or unjust enrichment out of trust funds always implies an obligation by operation of law that the recipient of the funds of another will do what equity requires in order to retain them. But I will not, from various considerations, advance this last as an additional reason for my construction of the orders of the Supreme Court as really orders for *collatio bonorum*. So to do would suggest too many points open to discussion.

The surrogate has now been at some pains to show that "hotch-pot" is a technical term of limited application in our law. To some extent "hotch-pot" is now incorporated in our present Statute of Distributions. Neither the Statute of Distributions nor "hotch-pot" applies to the advances in question in this proceeding. It has been shown that equity has, however, jurisdiction to direct that such advances as those here in question should be brought into the account on the final distribution of the lunatic's estate or that part of it which passes as if *ab intestato*. It has also been held that the surrogate is now competent in proceedings of this kind to decree equity. It has also been intimated that "*collatio bonorum*" is a part of the common law of this court in proceedings of this character for distribution, and consequently that if the jurisdiction of courts of equity is in any way defective the principle of *collatio bonorum* is here

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applicable. But this point is not essential to the decision, because there is not much difference in principle between "hotch-pot," the equitable doctrine of advancements, or *collatio bonorum*. The term "hotch-pot" is often used for all of them, a use which tends to some confusion of principle.

I am unable to find any adjudication of this state which denies to equity the right to decree a *collatio bonorum* in a proper case. Our cases on the Statute of Distributions do hold that the statute has no application to advances by those who die testate or partly testate or to advances made to others than to children. There is nothing new about this. It was so held under both the old Statute of Distributions (22 & 23 Charles II, chap. 10), and the custom of London on which this part of the old statute was founded. *Hedges* v. *Hedges,* Finch Prec. chap. 269; *Northey* v. *Strange,* 1 P. Wms. 340; *Hume* v. *Edwards,* 3 Atkyns, 450; Equity Cas. Abridged, 262, Customs of London. The cases in this state do not hold and cannot hold, as I understand it, that equity cannot decree that sums advanced shall be brought in a proper case into the final account on distributions other than those enumerated in the Statute of Distributions. To so hold would extend the operation of the Statute of Distributions in a most unwarranted manner and contradict the whole course of equity.

In view of what has been said it is decreed that the sums advanced under the orders of the Supreme Court shall be adjudged in this proceeding as advances where those so advanced are entitled to share in the distribution. The sums advanced to Angelina Cooper cannot be so adjusted as she is not entitled to share in the distribution. This is so held both in equity and in the Roman law relating to *collatio bonorum*. The advances to be collated must be taken at their face

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value at the time they were received. No interest is chargeable thereon. The doctrines relating to charging interest have no application to collation. This is so both by the common law and the civil law.

One other point is raised in this accounting. The New York Association for Improving the Condition of the Poor, a charitable corporation, objects that it is not exonerated from any share of the federal income tax. This objection is in general well founded, but it seems that the accountant has not attempted to make the association bear any part of the income tax accrued since the date of the death of the testator. Under the federal law income tax due is assessed against an executor as a debt of the estate. The accountant has only charged the estate for the income tax paid for the year before the testator's death. That is proper, and it should be paid by the accountant out of the general funds of the estate. This objection should, I think, be overruled as to the amount so paid, although sustained in principle. Settle decree accordingly, with leave to apply on the settlement for any further directions desired.

Decreed accordingly.

Matter of Proving the Last Will and Testament of NELLIE SABIN HYDE FARMER, also Known as NELLIE HYDE FARMER, Deceased.

(Surrogate's Court, New York County, March, 1917.)

Wills — construction of — jurisdiction — bequests — gifts — Code Civ. Pro. § 2615.

A written demand by any party to a probate proceeding for a construction of a will, even where the petition does not request it, is a sufficient compliance with section 2615 of the Code of

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Civil Procedure, and the surrogate may proceed to construe the will.

The jurisdiction of the surrogate to construe a will cannot be enlarged so as to enable him to determine the title of testatrix to certain personal property unless such an adjudication necessarily follows from a proper act of construction of the will.

A bequest of personal property subject to the condition that after the decease of the legatee it shall be given to another is an absolute gift to the first legatee.

A bequest of income of corporate stock with no mention of the remainder interest constitutes an absolute bequest of the stock.

A bequest to one and in case of her death to another refers to the first legatee predeceasing testatrix and constitutes an alternative gift in such event to the second legatee.

A bequest of one-third of the residuary estate to "the woman who shall take care of me in my last illness" is void for uncertainty.

PROCEEDING upon the probate of a will.

Salter & Steinkamp, for proponent and executor.

Robert M. Moore, for contestant M. Dana Parker Tobin.

John J. Hynes, special guardian for infant.

Herman Elfers, special guardian for Nelson Cameron Hyde, Frederick Hyde and Dorothy Hyde.

FOWLER, S. On the probate of the will objections were filed and later withdrawn. The will was proved and a direction for probate consequently was given.

The validity and construction of certain clauses having been requested by some of the parties, the only questions now remaining are those relating to the true construction, interpretation and effect of the will. At

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the outset a technical objection is urged by the contestant, Mandana Parker Tobin, a sister of testatrix, that no construction can be obtained in this proceeding, because neither the petition for probate nor the citation prayed that relief. The answer filed by Ira Clark Hyde does request construction of the clauses numbered 5th, 6th, 7th, 8th and 16th of the will, and the special guardians for the infants, M. Carrie Parker, Dorothy Hyde, Nelson Cameron Hyde and Frederick Hyde make similar requests. This is sufficient. Section 2615 of the Code of Civil Procedure confers on the surrogate jurisdiction to construe a will in a probate proceeding when any of the parties expressly puts in issue such construction. It would seem that the surrogate's jurisdiction has been sufficiently invoked and a case made for construction by reason of the premises. As all the parties have had an opportunity of presenting their contentions, the surrogate should, I think, proceed to construe the will.

The disputed clauses of the will are as follows:

"*Fifth.*— I give to M. Carrie Parker, daughter of John Parker, the *income* from 29 shares of the stock of the Hoyt Realty Company. In case of her death said income I bequeath to my nephew, T. J. Parker. (Said income will be paid quarterly by the Hoyt Realty Co. for a period of ninety-nine (99) years.) I give M. Carrie Parker my amethyst and diamond ring. Also the large cluster horse shoe shaped diamond pin and pendant, given to me by Mrs. M. E. Sabin, who personally asked me to give this pin to some blood relative of hers, on condition that at her death it shall again be given to some blood relative of Mrs. Sabin's on same condition of being guarded and passed on. Each recipient must thus promise before receiving her bequest.

"*Sixth.*— I give and bequeath to my sister, Mrs.

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Dana Tobin, my solitaire diamond bracelet. If she shall decease before me, then and in that case I give and bequeath the same to my niece, M. Carrie Tremblay, of Philadelphia, Penn. But said bracelet in either case is given subject to condition that it shall be passed on to a direct descendant of Mrs. Mary E. Sabin; one who shall be deemed best fitted to appreciate the same, and promise to carry out the wishes of Mrs. Sabin in that respect.

"*Seventh.*— I give and bequeath to my niece, M. Carry Tremblay, my 6-stone diamond bracelet (formerly owned by Mrs. Sabin), but the said bracelet is given subject to the condition that at her decease it shall be given to a direct descendant of Mrs. Sabin; one who will appreciate the bracelet and carry out the wishes of the said Mrs. Sabin in that respect.

"*Eighth.*— I give and bequeath my cluster ring, formerly owned by Mrs. Sabin, to my niece, Mrs. Alice Hyde Sharp, but said ring is given subject to the condition that it shall be passed on at her decease to a direct descendant of Mrs. M. E. Sabin, subject to same condition of all other articles formerly owned by Mrs. Sabin."

"*Sixteenth.*— I hereby give and bequeath all the rest, residue and remainder of my estate, real and personal, not herein disposed of (excluding the 29 remaining shares of Hoyt Realty Co.), to be divided equally by the following: M. Carrie Parker, T. John Parker and the woman who shall take care of me in my last illness. To the last named woman, nurse, caretaker and friend I give and bequeath the income for her life of the remaining 29 shares of Hoyt Realty stock; at her death said stock shall be assigned to N. Cameron Hyde for his use forever. In case of his decease said stock shall be given to Fred Hyde. If deceased, to Nellie C. Hyde, if living. If not, to

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Dorothy Hyde. Any one disputing or bringing my will into dispute or controversy shall have no part or share in my belongings."

It appears that testatrix left no husband or children and that her next of kin and heirs at law are collaterals.

The bequests of jewelry in the 5th, 6th, 7th and 8th paragraphs of the will are assailed by the special guardian for the infants, Nelson Cameron Hyde, Frederick Hyde and Dorothy Hyde, in the answer filed herein. It is averred that unlawful perpetuities are created and that the named beneficiaries take only a life estate, and that the remaindermen are not sufficiently identified. The sister of testatrix, Mrs. Tobin, contends that the ownership of testatrix in the property mentioned in the above paragraphs was limited to a life estate for her own life, and therefore her will cannot make any valid disposition of that property. The statement of Mrs. Tobin's contention is its own answer. The surrogate is not asked, in this proceeding, to determine the extent of the ownership of the deceased, nor is that question germane to a construction of the will. The jurisdiction given to the court to construe a will cannot be enlarged so as to enable it to determine the title of the testatrix, unless such an adjudication necessarily follows from a proper act of construction of her will.

The learned special guardian, in his brief filed, withdraws his contention, because he is now of the opinion that the bequests of jewelry contained in the 5th, 6th, 7th and 8th paragraphs of the will are not merely life estates, but are absolute bequests. I think that he is justified in taking this position. There is no language in the quoted clauses of the will sufficient to cut down the absolute bequests, and under the well-settled rule the court must construe the bequests as absolute. *Mat-*

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ter of Catlin, 97 Misc. Rep. 223. Doubtless a restraint upon the alienation of personalty is as illegal as one imposed upon a devise of real property, under the Revised Statutes and the Personal Property Law, section 11. Limitations of future estates in personalty are now subject to the same rules as prescribed in relation to real property. *Matter of Wilcox,* 194 N. Y. 288; *Matter of Griffin,* 75 Misc. Rep. 442; *Matter of Hansen,* 72 id. 617; *Van Horne* v. *Campbell,* 100 N. Y. 305. An undue restraint upon alienation of real property devised in fee is illegal, and therefore a similar restraint imposed upon a bequest of personalty falls in the same category.

Restraints at one time permitted in alienations of realty have never been sanctioned for personalty. As was stated in *De Peyster v. Michael,* 6 N. Y. 427, and in *Continental Ins. Co.* v. *New York & H. R. R. Co.,* 187 id. 225, 237, a restraint upon alienation can be imposed only where there is a reversion. As personalty is not a tenement, and there never was any feudal tenure of personal property, no reversion was left after the transfer of the absolute ownership of personal property. The rules relating to feudal tenure of real property, prior to the statute *Quia Emptores,* had no relation to titles or ownership of personal property. It follows that it is unnecessary to determine whether the restrictions sought to be imposed in the will are precatory, or mere hortatory expressions of desire, or whether or not the language is sufficient to create conditions. Likewise we need not distinguish between the kinds of condition which may have resulted from such bequests of testatrix. An illegal condition attached to personalty, whether precedent or subsequent, is disregarded. *Matter of Haight,* 51 App. Div. 310, 316. Without further discussion our conclusion may safely rest upon the authority of the analogous case of

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Hacker v. *Hacker*, 153 App. Div. 270. As a rule future interests in personal property can be created safely only through the medium of trusts, although the Revised Statutes now permit the creation of some future interests.

The contestant, Mrs. Tobin, further objects to the will on the ground that, in paragraph 5 thereof, there was an attempted disposition of 29 chares of stock in the Hoyt Realty Company for a period of ninety-nine years, contrary to our statute against perpetuities. The first sentence of the 5th paragraph, properly construed, means that the testatrix gives to M. Carrie Parker 29 shares of the stock in the Hoyt Realty Company, and that in case of her death prior to that of testatrix the property should be given to T. J. Parker. The statement that the income will be paid quarterly for a period of ninety-nine years is merely a description of the peculiar nature of the investment. Apparently the life of the corporation, or the dividends due therefrom, are limited to a duration of ninety-nine years. The 5th paragraph may be deemed to contain an absolute bequest of the stock, under the rule that a bequest of income, with no mention of the remainder interest, constitutes an absolute bequest. The reference to the death of the first taker means her death prior to that of the decedent. *Matter of Catlin*, 97 Misc. Rep. 223. Alternative gifts were intended.

Mrs. Tobin's contention makes no distinction between the relative rights of T. J. Parker and M. Carrie Parker. She merely urges that no one received a bequest of the stock and that the income only was disposed of for a period of ninety-nine years. None of the other parties except M. Carrie Parker and T. J. Parker can be interested in litigating any question as to their relative rights. They do not urge opposite

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contentions, but acquiesce in viewing the gift to M. Carrie Parker as absolute. Therefore, reaching the conclusion that there was an absolute gift of the stock and not merely a gift of the income, no further question remains concerning the stock. M. Carrie Parker is the absolute owner thereof.

The remaining questions involve a consruction of the 16th, or residuary, clause of the will. In the first place, the special guardian for the three infants, Nelson Cameron Hyde, Frederick Hyde and Dorothy Hyde, above named, and Mrs. Tobin urge that there is an intestacy as to one-third of the residuary, because the beneficiary thereof is not adequately named or described. As the record stands, it seems that their contention must prevail. The court is foreclosed from any further consideration of this question by the case of *Harrington* v. *Abberton,* 115 App. Div. 177. In that case the bequest read: "To the person, man or woman, that takes care of me in my last illness and that will remain with me and prepare me for a Christian death." The Appellate Division for the First Department was of the opinion that the bequest was void for uncertainty. While that learned court ultimately rested its decision upon the ground that the plaintiff, a paid employee, was not included in the bounty intended by the testatrix, the case should be deemed an authority in point. In a recent decision of the Court of Appeals in *Matter of Turner,* 206 N. Y. 93, a rule was laid down which at first glance might seem to militate against the foregoing conclusion. A closer examination, however, discloses that while the court laid down a broad rule for construing ambiguities, it did not intend to pass upon a case similar to the present one.

In *Matter of Turner, supra,* the testatrix devised to "John Turner One house; George Turner One house;

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William L. Turner, one house." The testatrix had, in addition to the houses specifically referred to in the will, three leaseholds on Ninth avenue. The Appellate Division held the bequest to the three sons void for uncertainty. The Court of Appeals reached a contrary conclusion, adopting the dissenting opinion below of Mr. Justice Miller, except in so far as that learned justice had held that the three sons took as tenants in common. The Court of Appeals held that each one of the sons was given a leasehold, with the right of selection in the order in which their names appeared in the will. Mr. Justice Miller in his opinion had said that the ambiguity in that case was a patent ambiguity, but that the only evidence not admissible in resolving this ambiguity was evidence of the declaration of the testatrix. The learned justice held that the circumstances surrounding the maker of the will were as admissible to explain a patent ambiguity as to explain a latent ambiguity. The Court of Appeals in adopting his opinion must be deemed to have laid down that rule of law as the law of this state. This was my own conclusion in *Matter of Fowles,* 95 Misc. Rep. 51. In the case now before me the ambiguity, as in the *Turner* case, is patent. Therefore, it would seem that the circumstances surrounding the maker of the will at the time the will was made would be admissible to explain the ambiguity. The rule admitting evidence of surrounding circumstances is, however, limited to circumstances in existence at the time the will is made. Those subsequently coming into existence are not admissible. *Morris* v. *Sickly,* 133 N. Y. 456, 459; *Matter of Hoffman,* 201 id. 255.

In deciding that evidence of surrounding circumstances was so admissible the Court of Appeals, in the *Turner* case, must me understood, I think, to mean circumstances surrounding the testator or testatrix at

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the time a will is made. Such evidence, limited to the time of the making of the will, in the case now before me, would be of no value whatever. Where the ambiguity consists in a description of a legatee, whose identity is not determinable at the time of the making of the will, evidence of the surrounding circumstances confined to that time can have no probative effect. The ambiguity in the *Turner* case related to an ambiguity in the description of the property attempted to be willed. The rule laid down in the *Turner* case, properly limited, must be taken to be that evidence is admissible of circumstances surrounding the maker of the will at the time the will is made in order to explain a patent ambiguity and that a patent ambiguity in the description of a legatee not in existence at the time of the will cannot be so explained. The Court of Appeals in the *Turner* case did not intend in any way to impugn the decision in *Harrington* v. *Abberton, supra.* The majority opinion of the Appellate Division cited that case, but neither Mr. Justice Miller nor the Court of Appeals made any comment about it, evidently believing that the case had no application.

It follows that there is an intestacy as to one-third of the residuary. The heirs at law or the next of kin should take this one-third under the well-settled rule that where a part of the residuary is imperfectly or illegally disposed of an intestacy results. *Matter of Hoffman,* 210 N. Y. 247; *Hughes* v. *Stoutenburgh,* 168 App. Div. 512.

The 16th paragraph of the will presents one more question: Is the gift of the remaining twenty-nine shares of stock in the Hoyt Realty Company void? I think for the reasons just discussed it is partly void for uncertainty. The first gift, however, is only of a life interest. Its invalidity does not affect the limitation of the future estate. N. Cameron Hyde, the

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remainderman, takes the twenty-nine shares of stock as an absolute gift. *United States Trust Co.* v. *Hogencamp,* 191 N. Y. 281. The bequests to Fred Hyde, Nellie C. Hyde and Dorothy Hyde are all contingent upon the decease of N. Cameron Hyde in the lifetime of the testatrix. The statement in the will that the Hoyt Realty Company stock cannot be sold is not a testamentary restriction in any way. It is merely a declaration by the testatrix of what she believed was a restriction upon the ownership of the stock.

The provision in the 16th paragraph of the will that any one disputing the will or bringing the will into dispute or controversy should have no part or share in the will is a condition *in terrorem* and without effect. While the will is offered for probate as a will of real and personal property, and though the residuary estate disposes of both, the assets of the decedent to be administered by her representatives consist only of personalty. As there is no gift over expressly stated to take effect for breach of the condition it is invalid. *Matter of Arrowsmith,* 162 App. Div. 623; 213 N. Y. 704.

Decreed accordingly.

Matter of the Application of DOROTHY F. DAVIS for Leave to Correct the Records of the Surrogate's Court, New York County, Recording the Last Will and Testament of JAMES T. DAVIS, Deceased.

(Surrogate's Court, New York County, March, 1917.)

Surrogates — duties of — lost wills — Code Civ. Pro. §§ 2486, 2490 (11).

As an incident to the duty of the surrogate under section 2486 of the Code of Civil Procedure to keep a book in which wills admitted to probate in his court must be recorded, he may, under section 2490(11) of said Code, grant an order

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directing the correction of the record of a will *nunc pro tunc* as of the date of record although the original will appears to be lost.

APPLICATION for an order directing the correction of the record of a will probated in this court.

Hendrick & Hendrick (Worden E. Winne, of counsel), for petitioner.

Thomas Fahey, for J. Bruce Robertson.

A. Perry Osborn, special guardian for Guy R. Robertson.

Samuel J. Wagstaff, special guardian for Edith C. Davis and Albert Herbert Davis.

FOWLER, S. This is an application by Dorothy F. Davis for an order directing the correction of the record of a will probated in this court. The original will is not produced on the application, but it is alleged that there is an error in the recording of the last will and testament of James T. Davis, deceased. The original will appears to be lost.

The petition sets forth that the last will and testament of James T. Davis was duly admitted to probate in this court on the 5th day of June, 1899, and that letters testamentary thereon issued to Henry C. Miner and Mary Louise Davis. It is further alleged that in and by the 1st paragraph of said will the testator devised certain real property of which he died seized known as No. 127 East Fifteenth street, New York city, to his widow, Mary Louise Davis, for the term of her natural life, and upon her death devised said property in fee to his brother, Albert H. Davis. Said will further provided by the 2d paragraph thereof that in the event said Albert H. Davis should predecease the said Mary Louise Davis said property was then

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devised unto the executor and the executrix named therein in trust with power to sell the same, subject to the said life estate of Mary Louise Davis, and to divide the proceeds derived from such sale equally among certain remaindermen. The said Albert H. Davis, who was the father of the petitioner in this proceeding, died on the 18th day of February, 1916. Mary Louise Davis, the life tenant, is still living.

The said last will and testament is recorded in Liber 608, page 404 of Wills, in the office of the surrogates for this county. As actually recorded it reads as follows: "*Second.* Should my brother, Albert H. Davis, die before my wife, Mary Louise Davis, I give, devise and bequeath the said before mentioned real property No. 127 East Fifteenth street, to my executor and executrix in trust with power to sell the same subject to the life estate of my wife, Mary Louise Davis, and to divide the proceeds derived from such sale equally among and between the lawful children of my niece, Mrs. Walter P. Robertson, share and share alike."

The petition alleges that the error committed in the recording of the original will of James T. Davis consists in the omission of the words "the lawful children of my brother, Albert H. Davis, and" in the 2d paragraph thereof, and that the recorded instrument should read as follows: "*Second,* Should my brother, Alfred H. Davis, die before my wife, Mary Louise Davis, I give, devise and bequeath said before mentioned real property No. 127 East Fifteenth street, to my executor and executrix in trust, with power to sell the same, subject to the said life estate of my wife, Mary Louise Davis, and to divide the proceeds derived from such sale equally and among and between the lawful children of my brother, Albert H. Davis, and the lawful children of my niece, Mrs. Walter P. Robertson, share and share alike."

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In accordance with the prayer of the petition a citation was issued out of this court to all the children of the said Albert H. Davis and Mrs. Walter P. Robertson to show cause why the prayer of the petition should not be granted. Upon the return of the citation the surrogate, because of the adversity of interests between the two sets of infants interested in this proceeding, appointed A. Perry Osborn, special guardian for Guy R. Robertson, and Samuel J. Wagstaff, special guardian for Edith C. Davis and Albert Herbert Davis. The only other appearance in the proceeding was J. Bruce Robertson, who appeared by his attorney, Thomas Fahey.

Upon the hearing, which was directed to be held by the surrogate and which was not contested, it developed that at the instance of the petitioner an examination of the recorded instrument and a search of the records of this court were made by Worden E. Winne, her attorney, who found that the original will had been taken from the court on June 10, 1905, by one Warren S. Burt, for the purpose of using the same as an exhibit in a Municipal Court action then pending, in which some of the parties to this proceeding were interested. Mr. Winne then called at the Municipal Court in order to search the records thereof for the will in question, and found that owing to a fire the court records were not in regular order. He succeeded, however, in finding the papers in the action brought by the widow of James T. Davis against Albert H. Davis, but did not find among them the original will of James T. Davis. Subsequently a further search was made among the papers of Mr. Burt, who had died in February, 1916, by his associate, Mr. Fahey, and by Mrs. Maria A. Burt, widow of Mr. Burt, but to no purpose. Thereupon there was placed on the stand Maurice Meyer, an attorney and coun-

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selor at law, who testified that he was for many years the attorney for James T. Davis, and prepared the will which was probated in this court on the 5th day of June, 1899. He also testified that he acted as a witness to the will along with a clerk in his office, whose whereabouts are now unknown. He then produced a copy of the will of James T. Davis, which he testified was an office copy prepared at the same time as the original. Mr. Meyer further testified that this copy was prepared and retained in his office pursuant to his custom in such matters, and was, "to the best of his knowledge, belief and recollection," a true copy of the original. The copy of said will received in evidence contains the clause alleged to have been omitted in the instrument as recorded in this office. None of this testimony was objected to and it was taken without objection.

I hesitate, in view of the failure to produce the original will of James T. Davis, to grant this application. But the acquiescence of all the parties interested, and the uncontradicted proofs submitted in support of the petition seem to justify it, if I have jurisdiction. The important question in this proceeding, however, has to do with the power of the surrogate to grant the relief sought.

I may remark parenthetically that had the original will been set out in the decree of probate, or a true copy thereof annexed to the decree, this application would not have been necessary. I have often intimated in this court that in my judgment such was the better practice, and whenever the constituents or text of the will was in doubt I have insisted on it. But I have long hesitated to insist in other cases on any such practice in view of the long established practice to the contrary. In wills of vast estates the innovation might be useful, especially if the record of wills were to be

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destroyed in any way and the original will then lost or destroyed. A certified copy of a decree of probate, setting out the will probated, would be evidence in any court.

When the will of James T. Davis was probated, the original will was to be retained by the surrogate until the expiration of one year after it had been recorded, and then it could be returned unless there was a proceeding to revoke probate, to the person delivering it, or under certain circumstances to other persons. 2 R. S. 66, § 54; Code Civ. Pro. § 2635. This provision has since been repealed by the latest revision of the Surrogates' Law.

The surrogate is required to record in his office every will therein probated. Laws of 1787, chap. 38; 1 R. L. of 1813, 4; 2 R. S. 57, 58, 60, 68; old Code of Civil Procedure § 2623; present Code of Civil Procedure, § 2620. The obligation to record probated wills certainly requires the surrogate to record them correctly, and where they are recorded incorrectly the chief recording officer presumably has power to make the record conform to the fact. The statute now prescribes that a book shall be kept for the purpose of recording wills. Section 2486 of the Code of Civil Procedure requires that each surrogate must provide and keep the following books: "Subdivision 1. A record-book of wills, in which must be recorded, at length, every will required by law to be recorded in his office and the decree admitting it to probate."

I do not find any statute which expressly confers jurisdiction on the surrogate to grant the relief sought under the circumstances set out in this proceeding. If he has it at all it results by implication only. A jurisdiction by implication never has been and is not now much favored in courts of this character. The implication in any event must be extremely clear to be

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sustained. It is a general principle of law that the surrogates' jurisdiction is peculiar and particular, as that of all courts of like character in common-law countries has been for time out of mind. There is nothing new about this limitation to lawyers who have a comprehensive knowledge of the jurisprudence of the common law, although it is sometimes intimated by our courts as a principle confined to the Surrogate's Court of New York.

Whenever I find no precedent for the surrogates' judicial action in statutes or in our own books or in the books of the common law I am somewhat careful not to usurp judicial powers from mere implications. That there is a jurisdiction somewhere to grant the relief sought I have no doubt. Whether the surrogate has it is the only question.

In *Matter of Meyer,* 72 Misc. Rep. 566, I attempted to classify the powers and duties of the surrogate as ministerial, judicial and inquisitorial. I was then of the opinion that the surrogates' power over the record of wills was very limited. P. 569. I have in other matters alluded to the nature of the surrogates' peculiar jurisdiction. *Matter of Connell,* 75 Misc. Rep. 574; *Matter of Work,* 76 id. 403, 411, overruled on another point; *Matter of Swartz,* 79 id. 388. The jurisdiction is largely derivative and historical in origin and the history is long and complex. It has been from time to time attempted to be prescribed or regulated by statute and in the main it is so regulated. The modern tendency has been to enlarge the surrogates' jurisdiction in all directions and then to treat the jurisdiction as circumscribed by the statute only. But without reference to the common law the statutes affecting this court are not always intelligible or workable. But with the aid of the common law the natural limitations on the surrogates' jurisdiction,

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however conferred, become very apparent. It is circumscribed, particular and peculiar. The court itself is always classed by common lawyers among the "peculiar courts" known to our jurisprudence, and it is contradistinguished from the courts vested with jurisdictions of common-law origin.

Whether the statutes relating to the establishment of lost wills (Code Civ. Pro. §§ 1861–1867, 2613) had any real reference to such cases as this was a question which occurred to me on the argument of this application. But after due consideration I have come to the conclusion that this matter does not fall within those sections. This is a proceeding to amend *nunc pro tunc* a record of a will not lost, but duly probated, and only negligently recorded by no default of the parties themselves. The will in this instance is not to be established, or reprobated, or rerecorded.

In reference to my jurisdiction I may remark that the tendency of modern legislation is to take the Surrogates' Courts out of the class of peculiar courts known to the common law and place them in a new classification. This new dichotomy of jurisdictions seems to comprehend two classes of courts of original and general jurisdiction in law and equity; one having general jurisdiction over the affairs and property recently of the dead, and the other over the affairs and property of the living. That the new classification is scientifically defective goes without saying. The jurisdiction of courts like the surrogates' was never, even in its original and more limited extent, justifiable on any except historical grounds. But with this new legislation and classification I have nothing to do except to heed it. The jurisdiction is conferred by the legislature, and that ends it in so far as the surrogate is concerned.

We come now to the more immediate consideration

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of the surrogates' jurisdiction of this matter in the light of the new and existing legislation. Section 2490 of the Code of Civil Procedure gives the surrogate, in or out of court, the power, as the case requires:

"6. To open, vacate, modify or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers. * * *.

"11. With respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common law jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred."

Respecting the general jurisdiction of the Surrogate's Court section 2510 of the Code of Civil Procedure provides as follows: "Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

"To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full,

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equitable and complete disposition of the matter by such order or decree as justice requires."

It would seem that sections 2490 and 2510 of the Code of Civil Procedure intend to make the jurisdiction of the surrogate effectual to the full, equitable and complete disposition of all matters relating to the affairs of the dead where the will is probated or administration granted in his county. The jurisdiction must yield, however, in any particular special proceeding to the special limitation of the statute relating to that proceeding. See *Matter of Holzworth,* 215 N. Y. 700, affg. 166 App. Div. 150. While the present surrogates have only such jurisdiction as is conferred by statutes, construed by the common law and prior practice, they have in addition such incidental powers as are necessary to the exercise of the jurisdiction thus conferred. *Matter of Camp,* 126 N. Y. 390; *Matter of Runk,* 200 id. 447, 457. But in the exercise of these incidental powers a surrogate cannot proceed upon some novel theory of his own. He must always have reference to established usage and precedent. *Martin* v. *Dry Dock, E. B. & B. R. R. Co.,* 92 N. Y. 70, 74. I discussed this point in *Matter of Carter,* 74 Misc. Rep. 7.

This proceeding seems to have been brought more particularly under subdivision 6, section 2490 of the Code of Civil Procedure, and an attempt made to comply with the procedure necessary in similar applications in other courts of record. A petition was filed, a citation was issued and a judicial hearing of the parties had. *Matter of Henderson,* 157 N. Y. 423, 428; *Matter of Peck,* 131 App. Div. 81; *Matter of Robertson,* 51 id. 117; affd., 165 N. Y. 675. I prefer, however, to sustain this application, if I am to grant it at all, under subdivision 11 of section 2490 of the Code of Civil Procedure. This section contains a significant

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authority to the surrogate " to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." Section 2486, of the Code of Civil Procedure, as already stated, makes it the duty of the surrogate to keep a book in which wills admitted to probate must be recorded. As an incident to such duty it may be within the province of the surrogate, in a proper proceeding such as this, to order the correction of patent errors in such records proven to exist through the fault of the recording officer of this court. The same principle has been held in *Matter of Regan,* 167 N. Y. 338, 343, and Matter of Henderson, 157 id. 423, and I think it applies here. A similar question came up before Mr. Surrogate Rollins, and although it was not much examined he seems to have had no doubt about his power to amend the record of wills. *Dyer* v. *Erving,* 2 Dem. 160.

What the effect of amending the record of the will by the decree of the surrogate may be on the rights of the parties, their privies or assigns, I do not pretend to consider. That point and the evidential effect of the decree remain, as Chancellor Kent said, at the risk of the parties to a court proceeding. Application granted and record amended *nunc pro tunc* as of the date of record.

Application granted.

Matter of the Estate of MARY S. BIERSTADT, Deceased.

(Surrogate's Court, New York County, March, 1917.)

Transfer tax — taxes — wills — United States Revenue Act of September, 1916.

The tax imposed by the United States Revenue Act of September 8, 1916, upon the net estate of every decedent dying after the passage of the act, the rate being dependent

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upon the amount of the net estate left, is a tax upon the transfer of property and not upon the property itself.

As under said statute the tax imposed thereby is due the year after decedent's death, the amount thereof should not be deducted from the assets of the estate before computing its value for the purposes of the state transfer tax which, imposing a tax on the value of property transferred by will or by the intestate laws, is due immediately upon the death of decedent.

APPEAL from an order fixing and assessing a transfer tax.

George A. Viehmann, for executors.

Lafayette B. Gleason (John B. Gleason, of counsel), for the State Comptroller.

FOWLER, S. The decedent had her domicile in this state. She died on October 3, 1916, and left an estate which was appraised by the transfer tax appraiser appointed by this court at $2,203,564. From this amount the appraiser deducted debts, administration expenses and commissions of executors amounting to $95,970.18, but he refused to deduct the amount of the tax to which the estate is subject under title 2 of the United States Revenue Act of September 8, 1916. From the order entered upon the appraiser's report the executors have taken this appeal.

In *Matter of Gihon,* 169 N. Y. 443, it was held that the inheritance tax imposed under the War Revenue Act of June 13, 1898, should not be deducted from the gross estate of the decedent in order to determine the value of the estate for the purposes of taxation under our Transfer Tax Law. It is contended, however, that the act of September 8, 1916, is so essentially different from the act of June 13, 1898, that the decision in *Matter of Gihon* is not controlling in the matter under consideration.

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The act of June 13, 1898, imposed a tax upon the succession to legacies or distributive shares, and not on the entire personal estate of a decedent, and the rate of taxation was determined by the relationship of the legatee to the deceased as well as the amount of the legacy or distributive shares. *Knowlton* v. *Moore,* 178 U. S. 41. The act of September 8, 1916, imposes "a tax * * * upon the transfer of the net estate of every decedent" dying after the passage of the act, the rate being dependent upon the amount of the net estate left by the decedent. The act further provides the method for ascertaining the value of the net estate. It also provides that the tax shall be due one year after the decedent's death, and that it shall be paid by the executor out of the estate before its distribution. It is therefore apparent that there is a substantial difference between the act of June 13, 1898, and the act of September 8, 1916. If the latter act were construed as authorizing the government to take by virtue of its sovereign power a certain percentage of the property of a decedent upon his death, it would be substantially similar to the estate duty of England, and like that duty would be deducted from the estate as an expense of administration before the value of the legacies could be ascertained for the purpose of assessing a legacy or succession tax. The probate duty imposed by our Revenue Act of 1862 was also deducted from the entire estate as an expense of administration, and was entirely separate from the legacy duties which were imposed by the same act and which were deducted from the amounts of the individual legacies. *Matter of Gihon, supra,* decided not only that the inheritance tax imposed by the Act of June 3, 1898, upon legacies was not to be deducted from the assets of the estate in determining its value for the purpose of taxation under our Tax Law, but it also decided that expenses

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of administration should be deducted from the assets of the estate. If, therefore, the tax that may be imposed upon the net estate of a decedent under the provisions of the act of September 8, 1916, is an expense of administration, it should be deducted by the transfer tax appraiser appointed under our tax law.

It is specifically stated in the act of September 8, 1916, that the tax is imposed upon the transfer of the net estate. It is therefore a tax upon the transfer of property and not upon the property itself. In this essential particular it differs from the probate duty imposed by the act of 1862 or the estate duty of England. There cannot be a transfer unless something is transferred from one source of title or possession to another. The transfer contemplated by the statute, therefore, is the transfer from the decedent to the legatees mentioned in his will. In that respect and to that extent it is a succession or transfer tax; and, while it differs from prior acts in providing that the rate shall be determined by the amount of the net estate and not by the amount passing to the individual legatee, it is not the less a transfer or succession tax, in contradistinction to an estate tax.

Our Tax Law imposes a tax upon the value of the property transferred by the will of the decedent or by operation of the intestate laws of the state of decedent's domicile, and the rate of taxation is dependent upon the value of the individual bequest or distributive share. Such tax is due and payable at the time of the transfer, which is the date of decedent's death. (Tax Law, § 222.) Under the United States Revenue Act of September 8, 1916, the tax is due one year after the decedent's death. § 204. It would therefore seem incongruous to contend that a tax which is due one year after the date of decedent's death should be

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deducted from the assets of the estate before computing the value of the estate for the purpose of imposing a tax which is due immediately upon the death of the decedent. Besides, our Tax Law imposes a tax upon the value of the property transferred to the legatee by the will of the decedent. If the United States imposes a tax upon the privilege of transferring the property from the decedent to the legatee, the value of the property transferred is not diminished by the amount of such tax. It is true that the amount which the legatee eventually receives is less because of the imposition of such a tax, as the executor or administrator is authorized by the United States statute to deduct from the net estate the amount of such tax, but its imposition does not diminish the value of the property transferred by the will of the decedent, and it is upon such transfer that the law of this state imposes a tax. This proposition is made more manifest by the following illustration: If a testator bequeaths the sum of $10,000 to his nephew, and the estate has sufficient assets to warrant the executor to pay the legacy in full, the Tax Law of this state imposes a tax of $500 upon the transfer of the legacy. Under the United States Revenue Act of September 8, 1916, a tax would also be imposed upon the transfer of this $10,000 if the entire net estate exceeded $50,000. Assuming that this tax would be $100, the net amount which the legatee would receive from the executor would be $9,400. But that would not be the value of the property transferred to the legatee under the will of the decedent. The actual value of that transfer was $10,000. The $500 tax paid to the state of New York was not transferred to it by the will of the decedent, neither was the $100 paid to the United States, and as the tax imposed by the state of New York is upon the value of the property transferred by will or under the

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intestate laws, and not upon the value of the property which is eventually paid over by the executor or administrator to the legatee or next of kin, no deduction can be allowed from the value of such bequest on account of a tax imposed by any other government upon the right of the legatee or next of kin to succeed to the property.

In *Matter of Penfold,* 81 Misc. Rep. 598, I had occasion to consider a question which in some material respects is similar to that now presented for determination. The question there involved the right of the executor of an estate to deduct from the assets of the estate the amount of transfer tax paid under the laws of other states, and I then held that the taxes imposed by such foreign states should not be deducted from the assets in this state for the purpose of determining the value of the property liable to taxation under the tax law of this state. This decision was affirmed by the Court of Appeals in 216 New York, 171, and I believe that the reasons which led to the conclusion at which I arrived in that case apply with equal force to the determination of the question here presented.

From considerations of abstract justice I have the less hesitation in arriving at the conclusion indicated, because of the fact that the collector of internal revenue, in ascertaining the value of the net estate subject to taxation under the Revenue Act of September, 1916, deducts from the gross estate the amount of taxes assessed against the estate in this state. This practice eliminates any question of taxation upon property already appropriated by another state in payment of the tax assessed under its tax laws. The order fixing tax will therefore be affirmed.

Order affirmed.

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Misc.– Surrogate's Court, Oneida County, March, 1917.

Matter of the Judicial Settlement of the Estate of SUSAN P. CLEVELAND CHILD, Deceased.

(Surrogate's Court, Oneida County, March, 1917.)

Legacy — when lapses — wills — intestacy.

Where one-half of a residuary estate was bequeathed to a certain person, her heirs, executors or administrators, and the legatee predeceases the testatrix, the legacy lapses and passes to the next of kin of the testatrix as in the case of intestacy.

PROCEEDING upon the judicial settlement of the accounts of an executor.

F. H. Cookinham, for executor.

Chas. B. Mason, for S. Fannie Harder and Michael Harder, contestants.

Geo. E. Philo, special guardian for minor, Mary Coley.

SEXTON, S. The material part of paragraph 7 of the will of testatrix herein reads as follows: "All the rest, residue and remainder of my property I give, devise and bequeath as follows: One-half of the same to Christina Harder, of Troy, N. Y., her heirs, executors or administrators."

The testatrix survived said Christina Harder.

On the accounting herein, the executor took the position that the testatrix died intestate as to one-half of the residue of her estate, and proposes distribution thereof to the next of kin of the deceased living at the time of her death.

The heirs of said Christina Harder filed objections to said proposed distribution, alleging that the legacy

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of one-half of the residue had not lapsed, because of the death of said Christina Harder, it having been saved by the words "her heirs, executors or administrators."

It is a well-known principle of law that no gift can vest in the donee until the death of the testator. *Matter of Wells,* 113 N. Y. 396. That this principle was known to the testator is apparent from the following language used by her on the first page of her will: "To the Reverend Edward Huntington Coley, my sofa. Should Mr. Coley decline to receive this gift, or should he predecease me, I then will and direct," etc.

If it was the intention of the testator that the heirs of Christina Harder should have the portion provided for her, in case the vesting of the legacy was defeated by death, then, knowing how to save the legacy to the heirs of Christina Harder, would she not have used language that would have clearly accomplished that purpose? She made it plain that if Coley should predecease her, the property intended for him should go elsewhere.

The words "her heirs, executors or administrators," have no such meaning as that contended for. In *Corbyn* v. *French,* 4 Ves. 418, Lord Alvanley said: "A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear." Can it be said that such an intention is made "clear" by the addition of the word "heirs?" It has long been a rule of construction that the word "heirs," as used by the testator, is a word of limitation and that it, and kindred words, whether used singly or associated with such expressions as "executors or administrators" or "to have and to hold the same to them, their heirs and assigns forever," are used, and can serve no purpose, other than to

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Misc.– Surrogate's Court, Oneida County, March, 1917.

describe the nature and duration of the estate given, and, it may be added, that the doctrine of lapse applies indiscriminately to gifts with and without words of limitation.

The rule in *Shelley's Case,* 1 Rep. 93, makes it clear that the words, "heir," "heirs," "lawful heirs" and the like may be used in two senses: (a) to describe the estate or interest given; (b) the persons who are to take. When used in the former sense they are said to be used as words of limitation, that is, they limit or describe the estate given, and not the persons who are to take.

To illustrate such a use, a gift "to A and his heirs" is simply a gift of the fee to A, for if A dies before the testator the heirs of A do not take. As an illustration of the use and force of the words in the second or (b) sense referred to above, a gift "to A, and if he should die, then to his heirs," — the word "heirs" clearly describes the persons who take in case A dies before the testator. The best method to prevent a lapse is thus made plain. It is known as "substitution under testamentary provision," and gifts are said to be substitutional when provision is made for some one to take the gift in case of the death of the original donee before the death of the testator.

In the clause under consideration no such provision was made, for the language used, taken as a whole, "was an expression consistent with the gift of an absolute ownership, but in nowise indicative of a direction to transfer the part given to a legatee to his heirs, or personal representatives, in the event of his failing to survive the testatrix." *Matter of Wells, supra.*

It seems clear that the legacy in question lapsed; having lapsed what becomes of it? This was a legacy of one-half of the residue. Where there is a dispo-

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sition of a part of the residue, and it fails, it will not go in augmentation of the remaining parts as a residue of a residue, but will devolve as undisposed of. Residue means all of which no effectual disposition is made by the will, other than by the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to the other, would be to hold that a gift of a moiety shall eventually carry the whole. 1 Jarman Wills, 764, and cases cited; *Morton* v. *Woodbury*, 153 N. Y. 243.

I hold and decide that the legacy in question lapsed; hence the heirs, next of kin or personal representatives of Christina Harder, as such, are not entitled to any part of the estate in question. The testatrix having died intestate as to one-half of the residue of her estate, the same, under the law, passes to her next of kin.

Decreed accordingly.

Matter of the Appraisal of the Estate of SAMUEL E. MAGUIRE, Deceased.

(Surrogate's Court, Suffolk County, March, 1917.)

Transfer tax — when opening of joint deposit account in bank not subject to — taxes — evidence — Tax Law, § 220, as amended in 1915 and 1916.

Where a joint deposit account in a bank was opened in the name of decedent and another, subject to the check of either or survivor, prior to the amendments of 1915 and 1916 to section 220 of the Tax Law, which provides that, whenever property is held in the joint names of two or more persons payable to either or the survivor, upon the death of one the right of the surviving joint tenant shall be deemed a transfer taxable under the statute, said statute as so amended cannot be given a retroactive effect, and the deposit in question is not subject to a

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transfer tax it not being part of the estate of decedent nor a gift made in contemplation of death.

While since as well as before said amendments to section 220 of the Tax Law the state comptroller may prove the ownership of the deposit in the decedent, no transfer tax can be imposed in the absence of such proof.

PROCEEDING upon petition asking that a joint account be exempted from a tax.

John R. Vunk, for Mary L. Maguire.

William H. Robbins, for State Comptroller.

STRONG, S. A petition is filed on notice to the state comptroller asking that a joint deposit account in the Patchogue Bank in the name of decedent, Samuel E. Maguire, and Mary L. Maguire, subject to check by either or the survivor, be declared exempt from tax under the laws relating to taxable transfers of property, the bank having refused to pay the deposit upon the demand of the survivor without the consent of the state comptroller.

The state comptroller has appeared and objects to the granting of the order, claiming that section 220 of the Transfer Tax Laws, as amended by Laws of 1915, chapter 664, and Laws of 1916, chapter 323, provides for a transfer tax on money deposited in banks in the joint names of two or more persons, payable to either or the survivor. The claim is that the right of the survivor to the ownership of such accounts is a taxable transfer.

Section 220 of the Tax Law, as amended by Laws of 1916, chapter 323, reads as follows:

"§ 220. Taxable transfers. A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in

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trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

"7. Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will."

The section and all the different subdivisions of this section 220 of the Tax Law relate to transfers of property, whether tangible or intangible. Subdivision 7, under which it is sought to tax this joint account, recites that "Whenever property is held in the joint names of two or more persons * * * payable to either or the survivor, upon the death of one of such persons the right of the surviving * * * joint tenants, * * * shall be deemed a transfer taxable under the provisions of this chapter."

The added subdivision clearly provides that in case of the death of one joint tenant the right of the surviving joint tenants shall be deemed a transfer taxable under the act. It attempts to include interests within the provision of the Transfer Tax Law by legislative fiat. If one of several joint tenants dies, it

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decrees that a transferable interest passes to the others and that a tax shall be imposed. No provision is made by definition or otherwise as to the proportion or rate of tax to be divided between the remaining joint tenants should they be of different degrees of relationship; but a tax must be imposed as though the whole property belonged absolutely to the joint tenant who shall first die. Is there an interest which passes and which can be made a transfer subject to tax by legislative fiat?

If there is a transfer taxable under section 220 of the Tax Law as amended, this account is liable to it. The rights of the joint depositors were fixed at the time of opening the deposit. At the death of one of the depositors an estate could not pass by will or by intestate laws. In *Matter of Thompson*, 167 App. Div. 356; affd., 217 N. Y. 609, the court said (at p. 360): "The transaction was complete in each instance when the money was deposited in their joint names, and did not, therefore, constitute a gift intended to take effect at or after death of decedent." In *Matter of Dalsimer*, 167 App. Div. 365; affd., 217 N. Y. 608, the court said (at p. 367): "The title to such securities was in them as joint tenants and from that time until the decedent's death neither he nor his wife had the exclusive title; on the contrary, each had a 'unity of interest, unity of title, unity of time and unity of possession' (17 Am. & Eng. Ency. of Law [2d ed.], 649) — all the essentials necessary to create a joint tenancy, and which, once created, carried with it the right of survivorship. It is by reason of this right that it has been held that the interest of a joint tenant is not descendible and cannot be devised by will. No right passes by the death of one of the joint tenants and its only effect is to vest the entire title in the survivor."

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In this account either of the joint tenants had the right of withdrawal during the life of both and the survivor survived in his right at the death of the other. Joint tenancy differs from tenancy by entirety in that during the life of both either of the joint tenants may withdraw without the assent of the other any part of the account, or the whole, and thus close the account. The right of the survivor to take the entire property is not a gift from one joint tenant to another, but a right of contract entered into between them when creating the joint tenancy at the time of making the deposit. It is a right which survives, not a transfer of interest which passes. It cannot be subjected to tax as a transfer of tangible or intangible property. The state comptroller since, as well as before, the amendment may prove the ownership in the deceased; but there is no presumption of ownership in the deceased and in the absence of proof no tax can be imposed.

Another objection enters. This deposit was made prior to the amendment of 1915 (Laws of 1915, chap. 664). The rights of the parties were fixed at the time of the change of the law and the amendment cannot be given a retroactive effect. *Matter of Horler*, 97 Misc. Rep. 587.

The bank account not being a part of the estate, nor gift made in contemplation of death, is not subject to the provisions of the Transfer Tax Law.

Decreed accordingly.

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Matter of the Appraisal of the Estate of ADALINE WINTJEN, Deceased.

(Surrogate's Court, Westchester County, March, 1917.)

Transfer tax — taxes — joint tenants — when mortgages subject to transfer — Tax Law, § 220(7), as amended in 1916.

Decedent, who died after the amendment of 1916 to section 2207 of the Tax Law, and her husband had years before jointly invested in real estate mortgages which contained the following: "It is understood that the parties of the second part heretofore hold this mortgage as joint tenants, it being their intention that on the death of one the survivor shall absolutely own the same." *Held*, that said amendment was retroactive and that the mortgages were subject to a transfer tax thereunder.

APPEAL from an order assessing a transfer tax.

Harry V. Morgan, for appellants.

Francis A. Winslow, for State Comptroller.

SAWYER, S. Adaline Wintjen died on May 20, 1916, leaving a last will and testament which was duly admitted to probate by the surrogate of Westchester county.

In the years 1906 to 1913, both inclusive, Adaline Wintjen, the decedent, and Marx Wintjen, her husband, jointly invested upwards of $150,000 in mortgages covering real estate, all of said mortgages containing the following clause: "It is understood that the parties of the second part heretofore hold this mortgage as joint tenants, it being their intention that on the death of one the survivor shall absolutely own the same."

The transfer tax appraiser has held that these mort-

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gages are taxable under the provisions of chapter 664, Laws of 1915 (the Tax Law), as amended by chapter 323 of the Laws of 1916. The executor and the husband of decedent both appealed.

The statute in question under which the mortgages have been taxed is as follows:

"7. Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will."

The mortgages in question were held by the decedent and her husband as joint tenants and not as tenants in common.

It seems to me that the statute is retroactive and refers to property held jointly prior to the passage of this act as well as to property thus acquired after its passage.

I am unable to find where the question of the constitutionality of the statute under consideration has been passed upon by the higher courts. But I will sustain the law on the ground that a statute should not be pronounced void by a court of first instance. *Matter of*

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Wendel, 95 Misc. Rep. 406; *Matter of Hosack,* 39 id. 132.

But one exemption of $5,000 should be allowed from the aggregate amount of all transfers passing to the beneficiary. Tax Law, § 221-a, as amd. by Laws of 1915, chap. 664. Order fixing transfer tax affirmed.

Order affirmed.

Matter of the Judicial Settlement of the Proceedings of WARWICK EMILE MONTGOMERY, as Trustee, etc., of ROMANZO W. MONTGOMERY, Deceased.

(Surrogate's Court, Westchester County, March, 1917.)

Taxes — upon real property — when burden of paying taxes must fall upon remaindermen.

Where the bulk of a testator's estate consisted of three parcels of real estate, only one of which was productive and the holding of the property during the last fifty years has greatly increased its value, all of which will inure to the benefit of the remaindermen, and a portion of one parcel of unimproved property remains unsold, the burden of the payment of the taxes thereon must fall upon the remaindermen and be paid out of the principal and not out of the income to the prejudice of the life beneficiary.

PROCEEDING upon the judicial settlement of an account by trustee.

Evarts, Choate & Sherman, for petitioner.

Clifford Couch, special guardian.

SAWYER, S. The bulk of the testator's property consisted of three parcels of real property. One parcel was productive and two parcels were unproductive. One parcel of unimproved property still remains unsold, except that a portion was sold for $68,400. This property has steadily increased in value until

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its assessed valuation is now nearly three and one-half times more than it was in 1893. The trustees have paid the taxes on this unimproved property out of income, and Mrs. White, the life beneficiary, claims it should have been paid out of principal.

The latest decision on this point is in *Spencer* v. *Spencer,* 219 N. Y. 459, decided December 28, 1916. In that case the court states: "The general rule undoubtedly is that taxes and carrying charges on real estate held by trustees for a life beneficiary are to be paid out of the income of the trust estate, and are not properly chargeable to capital account, unless the will of the testator contains unequivocal directions to the contrary. The authorities establishing this proposition are numerous. The following cases illustrate the rule, perhaps as well as any others: *Matter of Albertson* (113 N. Y. 434); *Woodward* v. *James* (115 N. Y. 346); *Clarke* v. *Clarke* (145 N. Y. 476). There is, however, no doubt that this rule of construction which requires the payment of taxes and carrying charges out of income yields when opposed to the plain intention of the testator. (*Lawrence* v. *Littlefield,* 215 N. Y. 561; *Matter of Pitney,* 113 App. Div. 845; affd. 186 N. Y. 540; *Sheffield* v. *Cooke,* 98 Atl. Rep. 161.)"

The holding of this property during the last fifty years has greatly increased its value, all of which will inure to the benefit of the remaindermen. The failure of the trustees to sell has deprived the life beneficiary of the income. Clearly, the testator never intended the remaindermen to grow rich at the expense of the life tenant. To compel her now to assume this burden would be something never contemplated by him. Equity and justice require that the burden should fall upon the remaindermen who will receive the benefit.

Decreed accordingly.

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BENJAMIN GOLDFARB et al., Plaintiffs, v. THE CAMPE CORPORATION, Defendant.

(City Court of the City of New York, Trial Term, March, 1917.)

Personal Property Law — "Sales Act" — contracts — damages — date of delivery — actions — Laws of 1911, chap. 571, § 148 (2, 3).
Contracts — written — action for breach of — trial — jury — damages — evidence.
Evidence — when admissible — trial — contracts — jury.

That portion of the Personal Property Law, commonly known as the "Sales Act" (Laws of 1911, chap. 571), including section 148 thereof, applies to contracts for the future delivery of goods.

Where the buyer under such a contract, upon notification from the seller that it will make no deliveries, has commenced an action to recover damages for breach of contract, he is under no obligation to acquiesce in the seller's effort to withdraw its renunciation or accept delivery when tendered on the contract date.

Where the contract renounced relates to goods for which there is an available market at the time and place set for delivery, the law does not require the buyer to purchase goods, give replacing orders, or to do anything to reduce his damages below the difference between the contract price and the market value at the time and place set for delivery.

Under section 148 of said "Sales Act" the buyer's duty to do what he can to lessen his damage because of the seller's renunciation of the contract applies only to cases in which there was no available market at the time and place set for delivery, where the goods could be purchased, or the buyer proposes to plead and prove special circumstances tending to show proximate damages of a greater amount than the difference between the contract price and the market price of the goods at the time when they should have been delivered.

Subdivisions 2 and 3 of said section 148 do not authorize the renouncing seller to either plead or prove special circumstances tending to show that the proximate damage, *i. e.*, the loss which the buyer necessarily sustains, was less than the difference between the contract price and the market price, even

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though, before the date for any delivery arrived, the seller offered to do that which would enable the buyer to have full and prompt performance and avoid any loss at all.

The "anticipatory breach" of a contract for the future delivery of goods, through the seller's announced intention not to perform, does not fictitiously move the specifications of the contract, as to the time of performance, ahead to the time of such repudiation and enable the buyer to regard the seller as liable for failure to perform a new obligation to perform, as of the date of the repudiation; but the "anticipatory breach" does confer, though not necessarily, an optional right upon the buyer to sue to recover damages admeasured as though the contract calls for performance as of that date.

The provision of subdivision 2 of said section 148, that, in an action for failing to deliver goods, the buyer's measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of the contract, applies to goods for which there is an available market, only upon taking into account the provisions of subdivision 3 of said section by which the buyer of such goods is entitled to receive at least the difference between the contract price and the market price at the time and place of delivery and may recover a greater sum by pleading and proving special circumstances tending to show that his actual proximate loss was greater than that difference.

Under a written contract, pursuant to which defendant agreed to make installment deliveries of a certain number of cases of goods, the first installment was promised for February 15, 1917, and deliveries were to continue during the spring and be completed in June, 1917, but in December, 1916, when the conditions of prospective supply of the goods were very unfavorable, and it seemed possible that before the arrival of the time for the first delivery the shortage would force the market price far above the contract price and, perhaps, make deliveries impossible, defendant notified plaintiffs that it would make no deliveries under the contract. After the commencement of an action to recover damages for breach of the contract, but before the first installment would have been due, market conditions changed and defendant notified plaintiffs of its willingness to perform the contract in all respects, including deliveries at the contract price on each of the specified dates, and four days after the delivery date for the first two cases and before plaintiffs would have been entitled to receive any of the remaining cases under

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the contract, the action was brought to trial. On granting a motion to set aside a verdict and to restore the case to the calendar for retrial, *held*, that the trial in advance of the delivery date did not preclude an award of compensatory damages measured by ascertainment of the probable market price on the future delivery date.

That error in the jury's ascertainment of that probable market price was one of the risks which the buyer assumed in seeking trial before the arrival of the delivery dates.

That plaintiffs were entitled to have the jury determine and award them for the first installment of two cases the difference between the contract price and the market price therefor on the delivery date, and also the jury's computation of the same difference as to the quantities deliverable on the dates enumerated in the contract down to June 1, 1917.

That the market price of the goods for immediate delivery on the renunciation date was not controlling, nor was the price at which plaintiffs could on that date have made replacing contracts for delivery on the date specified in the broken contract.

That plaintiffs to establish their damages were not required, on the renunciation date or at any time thereafter, to secure replacing contracts at the best market price obtainable for the whole or any part of the original contract, nor were they required to show the market price for the whole quantity of the agreed shipments by the indicated installment if sought to be procured from others.

That what the market price of the goods in suit would probably be upon the dates enumerated in the original contract would be for the jury to determine as best it could from the evidence adduced on either side.

That evidence of the market price and conditions on the first delivery date would obviously be admissible, as would likewise proof as to those prices and conditions before and after that date down to the day of trial.

That evidence of the market price on the day of renunciation, though admissible if not palpably too remote, would not be binding on the jury or fix automatically the recovery although, in the absence of proof as to later prices and conditions, it might sustain a verdict based on that figure on the theory of the presumed continuance of a condition not shown to have been changed.

That proof that inquiries among dealers in the goods had led

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to a quoting of a price and the actual purchase of goods at that price, even for less than the contract quantity, would be admissible if relating to a time not too remote.

That competent evidence of the price at which, at the time of the trial, orders could be placed with responsible firms for delivery of the goods on the remaining delivery dates specified in the renounced contract would be admissible as an aid to the jury in reaching a conclusion as to what the price will probably be on the eventual date.

That competent evidence would be admissible of prospective changes in conditions of supply, demand and the like, affecting market value before the delivery dates.

That the offer of defendant to withdraw its repudiation and make delivery on the contract dates at the contract price was neither material nor competent upon the issue before the jury.

ACTION on the commercial calendar of the City Court to recover general damages for the breach of two executory contracts for the sale of goods.

Philip Goldfarb, for plaintiffs.

Arthur Furber, for defendant.

RANSOM, J. This controversy turns upon several interesting questions as to the practical working out of the rule of the damages recoverable for so-called "anticipatory breach" of contracts to sell and deliver goods — questions owing their novel form, if not their origin, to recent calendar improvements which enable the plaintiff in a commercial action to have a trial, if he so desires, well within a month from the time his cause of complaint arises. In June and July of last year, the defendant entered into written contracts to make installment deliveries of thirty-nine cases of goods to the plaintiffs. The first installment was promised for February 15, 1917; deliveries were to continue during the spring and be completed in June. In December, 1916, the defendant notified the plain-

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tiffs that it would make no deliveries. Suit for damages for breach of the contract through this anticipatory notification was thereupon instituted by the plaintiffs. At the time of the December renunciation, the conditions of prospective supply of the goods were very unfavorable, and it seemed probable that before February arrived the shortage would force the market price far above the contract price and perhaps make deliveries impossible. After suit was started, but before the first installment would have been due, market conditions changed and the defendant notified the plaintiffs of its willingness to perform the contracts in all respects, including deliveries at the contract price on each of the specified dates. Four days after the delivery date for the first two cases and before the plaintiffs would have been entitled to receive any of the remaining thirty-seven cases under the contracts, the action was brought on for trial.

Under these unusual and apparently unadjudicated circumstances, the defendant contended, in substance, that although, under *Hochster* v. *De la Tour,* 22 L. J. (Q. B.) 455; *Roehm* v. *Horst,* 178 U. S. 1; *Windmuller* v. *Pope,* 107 N. Y. 674, and similar landmarks of that hard-fought battle ground of the law, the defendant's renunciation of its contract obligations gave the plaintiffs a right, at their election, to treat such announcement as a breach and thereupon to *bring suit* before any delivery date arrived, any award of more than nominal damages upon a trial in advance of the delivery dates could not be made, at least as to installments for which the delivery dates under the contract had not arrived at the time of trial. It was urged that, under section 148 of the portion of the Personal Property Law (Laws of 1911, chap. 571), commonly known as the Sales Act, an award of damages for non-delivery of commonly marketable goods cannot be made until

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arrival of the delivery date has disclosed the market price which fixes "the upper boundary" in any computation of the buyer's recovery. Upon the facts of the instant controversy, the defendant accordingly contended (1) that inasmuch as the plaintiffs had given no replacing orders following the December renunciation and had pleaded no "special circumstances" within the meaning of section 148 they had sustained no damage at all, in view of the defendant's offer, in December, to perform fully the contracts, under which no delivery was called for until February fifteenth; and (2) that, irrespective of the plaintiff's right to start suit before the delivery date for the first installment, they could not, in a trial four days later, be awarded damages representing "the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered" (§ 148), as to any installments for which the delivery date had not actually arrived at the time of trial. On the other hand, the plaintiffs contended (1) that section 148 does not undertake to state the rule of damages applicable to an action begun and tried before the delivery date, and predicated on breach through anticipatory notification rather than failure to deliver; (2) that the defendant's attempted recantation did not require the plaintiffs to regard the contract as again in force; (3) that the doctrine of the buyer's duty to reduce his damage by accepting opportunities for replacing orders has no application to contracts for commonly marketable goods; and (4) that, at least in the absence of allegations or proof of special circumstances, the rule of damages applicable to (1) above is that indicated by *Masterton* v. *City of Brooklyn*, 7 Hill, 61; *Barnes* v. *Denslow*, 30 N. Y. St. Repr. 315, 318; affd., 130 N. Y. 687; *Boyd* v. *Quinn Co*. 18 Misc. Rep. 169; *Williams* v. *De Soto Oil Co.*, 213 Fed

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Repr. 194, 198; *Follansbee* v. *Adams*, 86 Ill. 13, and similar decisions, which seem to make the market price at the time of the breach the standard of comparison with the contract price, in measuring the plaintiff's loss through the defendant's anticipatory refusal to do something for which the time of performance has not arrived at the time of trial.

Commenting upon certain of the foregoing contentions as to which we have indications of judicial opinion, if not definite adjudication, I think it may be said, without elaboration of reasoning, or authority, to be the rule of this jurisdiction: (1) That the Sales Act (Pers. Prop. Law), including section 148 thereof, applies fully to contracts for the future delivery of goods (§§ 86, 126, 148, subd. 3); (2) that the buyer after renunciation and suit was under no obligation to acquiesce in the seller's effort to withdraw that renunciation or accept delivery when tendered on the contract dates; (3) that where the executory contract renounced related to goods for which there is an available market at the time and place set for delivery the law does not require the vendee to purchase their goods, give replacing orders, or do any thing to reduce his damages *below* the difference between the contract price and the market value at the time and place set for delivery (*Saxe* v. *Penokee Lumber Co.*, 159 N. Y. 371, 378, 379; Pers. Prop. Law, § 148); (4) that the rule of the vendee's duty to do what he can to mitigate his damage applies only, under section 148, to cases in which there was no available market where the goods could be bought and sold, at the time and place of delivery, or the vendee proposes to plead and prove "special circumstances showing proximate damages of a greater amount" than "the difference between the contract price and the market or current price of the goods at the time when they ought to have been

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delivered;" (5) that section 148, subdivisions 2 and 3, does not authorize the renouncing vendor to plead or prove "special circumstances" showing that the proximate damages (*e. g.*, the loss which the vendee necessarily sustained) was *less* than the difference between the contract price and market price, even though, before the date for any delivery arrived, the vendor offered to do that which would enable the vendee to have full and prompt performance and avoid any loss at all; (6) that "anticipatory breach" through announced intention to withhold performance does not fictitiously move the contract specifications of times for performance ahead to the time of such repudiation and enable the vendee to regard the vendor as liable for failure to perform a new obligation to perform as of the date of repudiation; "anticipatory breach" confers an optional right to sue as of that date, but not of necessity to recover damages admeasured as though the contract called for performance as of that date (*Roper* v. *Johnson*, L. R. [8 Com. Pl.] 167; *Brown* v. *Muller*, L. R. [7 Ex.] 319; *Josling* v. *Irvine*, 30 L. J. Ex. 78; *Boorman* v. *Nash*, 9 B. & C. 145; *Leigh* v. *Paterson*, 8 Taunt. 540); and (7) that although in an "action for failing to deliver goods," subdivision 2 of section 148 provides that "the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract," this is applicable to goods for which "there is an available market," as for the goods here in controversy, only upon taking into account the provisions of subdivision 3, by which the buyer of such goods is entitled to receive *at least* "the difference between the contract price and the market price" at the time and place of delivery and may recover a greater sum by pleading and proving special circumstances showing that his actual proximate loss was greater than that

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difference. 2 Sedg. Dam. (9th ed.) § 636d *et seq.*; Williston Sales, §§ 584–587, 599; Wald's Pollock Contracts [Williston's 3d Ed.], 369.

Novelty attaches to the instant suit by reason of the fact that the plaintiffs press their case to trial before the "market or current price" at the times the goods should have been delivered had been disclosed by the arrival of the specified days. The rule laid down in section 148, declaratory of common-law authorities such as *Roehm* v. *Horst*, 178 U. S. 1; *Windmuller* v. *Pope*, 107 N. Y. 674; *Todd* v. *Gamble*, 148 id. 382; *Parsons* v. *Sutton*, 66 id. 92, has been often applied to actions *begun* before, but *tried* after, the delivery period. I cannot, however, regard trial before the arrival of part, or any, of the delivery dates, as authorizing the application of a different rule of damages than that declared in section 148. The *Masterton* case and others like it do not state a rule in any event applicable to executory contracts for the delivery of goods commonly obtainable in the market; they state, if anything with precision, the rule applicable to certain of the circumstances where "anticipatory breach" confers a right of action for the value of the contract lost through such repudiation — the difference between the contract figure for performance and the market cost of performance, of contracts outside the purview of section 148, subdivision 3. In other words, if one party to a contract is engaged in performing, or is to perform, thereunder certain work or supply certain materials, not in the nature of goods possessing a market value within the purview of subdivision 3, advance renunciation by the adverse party may be held to entitle the contractor to the value of the contract to him of the date when he was notified to do nothing further thereunder; but the *Masterton* case states no rule superseding the plain provision of sec-

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tion 148. On the other hand, trial in advance of the delivery date does not seem to me to preclude the award of compensatory damages, measured by ascertainment of the probable market price on the future delivery date. The question therefore becomes one of *evidence,* rather than of *rule;* the difficulty is inherent in the doctrine of " anticipatory breach," but the right to have the damage rule applied arises from acceptance of the doctrine at all. Error in the jury's ascertainment of the probable current price on the future date is one of the risks which the vendor assumes in advance renunciation and the vendee assumes in seeking trial before the delivery date arrives.

In the case at bar, therefore, the plaintiffs were entitled to have the jury determine and award them, at the trial four days after the delivery date for the first installment of two cases, the difference between the contract price and the market price for the two cases on the delivery date, and also the jury's computation of the same difference as to the quantities deliverable on the enumerated dates down to June first. The market price of the goods for immediate delivery on the renunciation date was not controlling, nor was the price at which the plaintiffs could, on that date, have made replacing contracts for delivery on the dates specified in the broken contracts. To establish their damages, the plaintiffs were not required, on the renunciation date or at any time thereafter, to secure replacing contracts at the best market price obtainable, for the whole or any part of the original contracts (*Saxe* v. *Penokee Lumber Co.,* 159 N. Y. 371), nor were they required to show the market price for the whole quantity of the agreed shipments, by the indicated installments, if sought to be procured from others. *Dana* v. *Fiedler,* 12 N. Y. 40. The plaintiffs

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would have had a right, I think, although that is not necessarily decided here, to fix definitely the measure of their damage by securing replacing orders for the whole contract quantity, as soon as possible after renunciation, although it has been held that if they had done so, and had become thereby obligated to pay more than the market price for the goods on the delivery date when it actually arrived, they could recover only the difference between the original contract price and the price on the delivery date, no matter what replacing contracts had fairly cost them at the time of renunciation. *York-Draper M. Co.* v. *Lusk,* 6 Kan. App. 629. What the market or current price of the goods in suit would probably be upon the date enumerated in the original contracts would be for the jury to determine, as best it could, from the evidence adduced on either side. Such a determination is at least no more speculative, difficult and uncertain than a discharged employee's probable earnings during the portion of a contract unexpired at the time of trial. The market price and conditions on the first delivery date would obviously be admissible in the case at bar; likewise proof as to those prices and conditions, before and after that date, down to the day of trial. The market price on the day of renunciation would thus be admissible, if not palpably too remote. It would not be binding on the jury, or fix automatically the extent of the recovery, as the plaintiffs claim, although, in the absence of proof as to later prices and conditions, it might sustain a verdict based on that figure on the theory of the presumed continuance of a condition not shown by the vendor or vendee to have changed, even as the discharging employer has the burden of showing that his liability should be diminished by earnings of the discharged employee during the remainder of the contract term. Proof that inquiries among dealers

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in the goods had led to the quoting of a price and the actual purchase of goods at the price, even for less than the contract quantity, would be admissible, if relating to a time not too remote. *Goldstein* v. *Arkell & Douglass, Inc.*, N. Y. L. J. March 30, 1917. "A price-list, stating the price at which a manufacturer will sell, or statements of dealers in answer to inquiries, are competent evidence of the market-price of a marketable commodity, and is a common way of ascertaining or establishing a market-price." *Harrison* v. *Glover*, 72 N. Y. 451. Competent evidence of the price at which, at the time of trial, orders could be placed with responsible firms for delivery of the goods on the remaining delivery dates specified in the renounced contracts would be admissible — not on the theory of mitigation, but as an aid to the jury in reaching a conclusion as to what the price will probably be on the eventual dates. Competent evidence would be admissible of prospective changes in conditions affecting market value before the delivery dates — conditions of supply, demand, and the like.

On the other hand, the offer of the defendant, at the end of December, to withdraw its repudiation and make deliveries on the contract dates at the contract price, does not seem to me material or competent upon the issue before the jury. Such an offer has no competency or bearing, as we have seen, unless as index of market price on the delivery dates from February fifteenth to June first. Emanating as it did from the defendant in the action, after the vendee had treated the contract as broken by renunciation and had brought suit therefor, the offer of the defendant has only the status of a December offer of replacing contracts, and it comes from a source so interested and provocative of such suspicion that the courts have commonly denied its admission to the record at all on the question of market value.

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In view of the vigor and ability with which the foregoing aspects of the case have been discussed in the submitted briefs, it has seemed fair to make a summary of my conclusions concerning them. In a number of respects which need not be itemized the rulings made upon the trial will be perceived to have been radically at variance with what should have been in the light of the conclusions enforced by a more careful examination of the subject. It follows that the verdict rendered should be set aside, and the case restored for retrial. An order to this effect may be submitted, setting the case down for trial before me, in Trial Term, Part III, on April 12, 1917, or sooner if mutually desired.

Ordered accordingly.

LEO D. SCHAFFER, Trading as the HELLEN DRESS COMPANY, Plaintiff, *v.* MECHANICS AND TRADERS INSURANCE COMPANY, NEWARK FIRE INSURANCE COMPANY, GERMAN FIRE INSURANCE COMPANY OF PEORIA, and HOME INSURANCE COMPANY, Defendants.

(Municipal Court of the City of New York, Borough of Manhattan, Second District, March, 1917.)

Venue — when motion for change of, denied — Municipal Court of city of New York — action upon policy of fire insurance.

Where an action was brought in the Municipal Court of the city of New York, borough of Manhattan, second district, where plaintiff resided, to recover upon a policy of fire insurance covering property contained in his place of business which was located within the third district of the borough of Manhattan, defendants' motion for a change of venue to either that district or to the second district of the Bronx will be denied.

MOTION for a change of venue.

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Leo Levy, for motion.

Goldstein & Goldstein, opposed.

LEVY, J. This is a motion that comes before me as presiding justice of the court for a change of venue in the above entitled actions from the second district Manhattan to either the third district Manhattan or the second district Bronx upon the grounds, substantially, (a) "that an impartial trial cannot be had in the district in which these actions are brought, and (b) that the ends of justice would be promoted by the change of place of this trial." These actions were commenced against these several defendants to recover in total the sum of $3,158.97 upon policies of fire insurance covering the plaintiff's property while contained in the premises No. 147 West Thirty-sixth street in this borough, and which aggregate some $5,000, and issue was joined during the month of April, 1916. From the defendant the Mechanics and Traders Insurance Company is sought the sum of $774.24; from the defendant the Newark Fire Insurance Company, a similar sum; from the defendant the German Fire Insurance Company of Peoria, the sum of $610.49, and from the Home Insurance Company, the sum of $1,000, each as a proportionate share of alleged settlement agreements made between these parties for damages, which the plaintiff claimed to have suffered by reason of a fire occurring in the aforementioned premises on the 7th day of December, 1915. The defendants claim that subsequently to the making of these agreements they discovered evidence of incendiarism as well as false proof of loss and therefore repudiated the settlements upon the theory that they were procured and induced by fraud and misrepresentation, a perfectly good defense, if true. In support of the

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motion it is alleged that counsel for the moving parties had considerable experience during the last eight or ten years in the trial of causes such as these, in this district, representing defendant fire insurance companies, on claims arising upon fire losses, and that during the examination of talesmen, he was unable to secure men who had not previously presented claims against fire insurance companies. It is further insisted that this district is so constituted that the community interest is conspicuously maintained; that most, if not all, of the talesmen summoned are naturalized citizens whose knowledge of the English language is not the best, and that very few of them have been educated in American schools; that there is a deep sympathy for persons occupying the position of this plaintiff and that an unjust and grave prejudice exists against insurance companies, so much so that no matter what the facts be, and no matter how righteous the defense, it is simply impossible to secure a verdict in behalf of a defendant insurance company. In fact a reading of the moving papers unhesitatingly leads one to the absolute inference that the calibre and the character of these talesmen are such as to render them wholly unfit for this rather high public service. There is vague and veiled suggestion that for the purpose of unjust enrichment these men permit themselves to be engaged in certain improper practices, which give rise to the bias complained against. To comment upon the latter, would, it seems to me, dignify a generality that deserves no other treatment than to be summarily dismissed. The moving papers also lay claim to the establishment by the plaintiff of a fictitious residence within the territory of this district in order to there secure a trial of this action; that the plaintiff might enjoy the advantages of, and the defendants suffer from, the rather grave and alarming conditions pointed

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out. Of course, these allegations are denied by the answering affidavits. Section 17, subdivision 1, of the Municipal Court Code in part provides: "An action *must* be brought in a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants *resides.* * * *." This disposes of the defendants' claim to a transfer of this cause to the third district Manhattan for concededly the premises No. 147 West Thirty-sixth street, which are within the latter district, were merely the *place of business* of the plaintiff and not his *residence.* Subdivision 2 of this section also in part provides: "If the action is brought in the wrong district, it may nevertheless remain there unless the defendant *demands* that it be transferred. Such *demand* must be made in writing and filed with the clerk *before* or *at* joinder of issue * * *." Here, issue was joined during April of last year and no demand as required by the foregoing provisions was made or filed; but the defendants present these motions pursuant to authority claimed by them as existing within subdivision 3 of section 7 and subdivision 5 of section 17 of the Municipal Court Code. Section 7, subdivision 3, authorizes the president of the board of justices of this court among other things to "transfer cases for trial from one district to another *in the same borough.*" Section 17, subdivision 5, in part provides: "Nothing in this section shall be construed to prevent * * * the president of the board of justices from transferring cases from one district to another *in the same borough.*" Having disposed of the matter of the transfer to the third district, the defendants' application in the alternative calls for a change to the second district of the Bronx. Clearly, I am without power to grant that, for in both subdivision 3 of section 7 and subdivision 5 of section 17 I am limited to an exercise of the right to transfer causes

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or to change the venue from one district to another, *in the same borough.* This court being in the borough of Manhattan and the place to which the transfer is sought being in the borough of The Bronx, two separate and different boroughs, neither provision is of any aid. The motion for these reasons must be denied.

Were it not, however, for the gravity of the charges laid by the moving papers I should content myself with this disposition. I cannot, however, reconcile myself to permitting them to go unchallenged. My opinion is that the assault upon the integrity of the jurors of this court, as a class, is not only wholly unwarranted but absolutely cruel. The men of this community, who are endeavoring to do their public duty by yielding up of their precious time that which is essential to proper jury service, hardly need any defense from me; but, lest my silence be regarded as tantamount to assent, tacitly at least, in their behalf I vigorously resent these unjust imputations. Then, too, I consider this a most unfortunate reflection upon the commissioner of jurors of this county. Section 121 of the Municipal Court Code provides the manner and the means by and from which jurors for this court shall be chosen, and perhaps it may be well to give the very language of this enactment in part at least: "*Trial jurors* for such terms shall have the *same qualifications* and shall be *selected, drawn* and *notified* by the *same authorities* and in the *same* manner as *trial jurors* of the *supreme court* held in the county in which such terms are held; and all provisions of the judiciary law and of the code of civil procedure, as they may be amended from time to time, except such as are inconsistent with this act, are hereby made to apply to this court and to trial jurors therein. * * *. So far as the *commissioner of jurors,* * * * shall find it to be *practicable,* each juror drawn shall be summoned

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to the district nearest to his *residence* or *place of business*. Such jurors shall be paid the same compensation as trial jurors in the *supreme court* held in the county in which they serve."

Unlike the practice of old, when perhaps just criticism might have been leveled against our then jury system, at present the commissioner of jurors is charged with the serious responsibility of selecting, drawing and notifying the talesmen; they are required to have the same qualifications as those drawn for the Supreme Court; he is charged with the duty of determining these qualifications and upon him devolve not only these duties but also the power, so far as he "*finds it to be practicable,*" to summon jurors to the district nearest their residence or place of business. In this manner, experience has demonstrated that a considerable number of the talesmen who are now serving actually do not reside within the territory of this judicial district and come from parts entirely remote. All the provisions of the Judiciary Law and the Code of Civil Procedure as they have bearing on either the qualifications or method of selection of jurors are made to apply to this court, and, if omission was occasioned in any respect, it must have been the omission of the commissioner of jurors. I have been in attendance very frequently at the latter's office in behalf of the court, at the selection and drawing of jurors, and I can confidently speak from personal knowledge and observation that this court receives precisely the same consideration in regard to its talesmen as do the various other courts within the county. Counsel, therefore, is apparently in error, and I shall not comment upon the matter of crimination contained in the papers nor upon the recital of what he regards as his unfortunate experience in the trial of causes in this district, except to say, that the juries which he was obliged to meet

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during all these years might properly have felt that their verdicts as rendered were entirely just. Besides, I have come to regard his charges as being entirely too general, and if he feels aggrieved he might promptly apply to the commissioner of jurors and there receive such consideration as he may be deserving. Since the argument of this motion I have diligently and studiously inquired into the prevailing conditions — which occasioned the delay of this decision — and I learn from my associates who have presided over the jury parts of this court, that the jury service of our talesmen is highly satisfactory; that the verdicts indicate conscientious endeavor to do *only* the right. These distinguished associates of mine are well known to be of the visiting judges, not those residing in this community, but altogether judges who come from every other part of the city. It is equally well known that the two jury parts of this court, since their formation, exclusively, have always been presided over by judges other than from this district. It is significant, too, that, as these judges observe, casualty and railroad companies both defending large volumes of litigation in this district have come to the practice of demanding jury trials. To my way of thinking fire insurance companies, relatively, occupy the position almost if not entirely identical with that of casualty and railroad companies in the matter of litigation in this part of the city; and why jurors should act in respect of the two last named in one manner and as to fire insurance companies in a diametrically opposite one, is difficult for me to conceive, unless even-handed justice requires it. It may be true that a large number of our citizens are of the naturalized class, it may also be true that few of them were fortunate enough to enjoy attendance in our common schools, but neither nor both of these misfortunes make for a lack of intelli-

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gence or honesty and do not necessarily mean that the talesmen are not sufficiently well equipped to adequately understand our language.

On the contrary, a higher effort to acquire education is unknown anywhere in this republic. There are more public and private schools within this judicial district, I dare say, than within any other similar territory, the city over. The intelligence of the citizenship of this community is too well known to permit of unearned rebuke of this character, and finally, were it not for the legal impediments, I do not hesitate to say that I would have summarily denied this motion upon the merits.

Motion, therefore, is denied, with ten dollars costs to the plaintiff.

Motion denied, with costs.

SAMUEL ROUSE, Respondent, *v.* H. HALPER, INC., Appellant.

(Supreme Court, Appellate Term, First Department, April, 1917.)

Lease — landlord and tenant — negotiable instruments — Statute of Frauds — contracts — tender — trial.

In an action upon a check given for the first month's rent of premises, under a letting for five years, it appeared that when plaintiff received the check he signed and gave to defendant's president a paper in the form of a receipt which stated the parties, the terms of the lease and the agreed rental. Later defendant's president refused to execute a lease tendered by plaintiff solely by reason of the high rate of insurance that would be imposed, on taking possession, for the transaction of defendant's business. *Held,* that assuming that the so-called receipt did not comply with the requirements of section 259 of the Real Property Law, the defense that there was no consideration for the check because the agreement for letting was not in writing had not been established and a judgment in favor of plaintiff should be affirmed.

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Defendant having repudiated its agreement upon grounds for which plaintiff was in no way responsible, it was not necessary for plaintiff to make a formal tender of a lease at the trial.

APPEAL by defendant from judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, in favor of plaintiff.

David L. Podell, for appellant.

Ralph V. Wechsler, for respondent.

GUY, J. In this action by payee against drawer of check given for the first month's rent of premises under a letting thereof for five years the defendant pleaded no consideration because the agreement was void under the Statute of Frauds, also that the contract was induced by fraudulent representations on the part of the plaintiff. The check was presented for payment to the bank upon which it was drawn; but the defendant had stopped payment.

There was a complete failure on defendant's part to establish the defense of fraud; so it is only necessary to consider the defense of no consideration in connection with the Statute of Frauds.

At the time plaintiff received the check he signed and gave to defendant's president a paper in the form of a receipt which stated the parties, the term of the lease and the agreed rental; it also contained a diagram of the property and stated that the covenants of the lease were to be "the usual term of the Gilsey form." A form of lease was subsequently tendered by plaintiff to defendant's president for execution; but the latter refused to sign the paper on behalf of the defendant, not because he objected to any of the covenants contained in the proposed lease but solely by reason of the high rate of insurance that would be

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imposed, on taking possession, for the transaction of defendant's business.

Assuming that the so-called receipt does not comply with the requirements of the statute (Real Prop. Law, § 259; 1 McAdam Landl. & Ten. [4th ed.] 189; *Sherry* v. *Proal*, 206 N. Y. 726), the defense of no consideration was not established.

In *Fleischman* v. *Plock*, 19 Misc. Rep. 649, an action on a check given by defendant as part consideration for the transfer of an interest in real property, this court reaffirmed the rule that money actually paid in advance by the vendee to the vendor under a verbal contract for the sale of lands cannot be recovered back upon the theory that the infirmity of the agreement worked a failure of consideration, where the vendor is prepared to perform; the attitude of the vendor, in so far as the statute affects it, is the same when he defends an action for the return of the purchase price as when he stands as a suitor upon the promise to pay; that in neither situation is he required to rely upon a contract in writing within the statute, since in each case the vendee, alleging a failure of consideration either for his case in chief or for defense to the instrument, has the burden of establishing the fact, and the presence of the consideration is made to appear in either aspect through the vendor's ability and readiness to perform the actual agreement, which the statute does not operate to render infirm except at an election, the right to which is abandoned by the only party possessing it. The right of a lessor of real property under the circumstances is the same as that of a vendor, because under the terms of the statute (Real Prop. Law, § 259) a contract for the leasing of real property for more than one year is coupled with an agreement for the sale of real property or of any interest therein.

The defendant having repudiated its agreement upon

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the grounds for which the plaintiff was in no way responsible it was not necessary for the plaintiff to make a formal tender of a lease at the trial.

Judgment affirmed, with twenty-five dollars costs.

PHILBIN and MULLAN, JJ., concur.

Judgment affirmed, with costs.

TRUSTEES OF THE MASONIC HALL AND ASYLUM FUND, Respondent, *v.* ALFRED G. FONTANA and JOHN BOGGIANO, Appellants, and WILLIAM H. GOMMERSALL, Defendant.

(Supreme Court, Appellate Term, First Department, April, 1917.)

Jurisdiction — of Municipal Court of city of New York — actions — corporations — damages — Stock Corporation Law, § 66.

Corporations — landlord and tenant — judgments — damages — actions — amendment — courts — Code Civ. Pro. § 724 — Municipal Court Code, § 6(7).

The Municipal Court of the city of New York has jurisdiction of an action brought by a judgment creditor of an insolvent corporation against its directors for making a transfer of all its property, prohibited by section 66 of the Stock Corporation Law.

Though it might be necessary for plaintiff in order to fix the amount of damages to prove the assets and liabilities of the corporation at the time of the prohibited transfer, plaintiff's recovery must be limited to the loss sustained, that is, the sum plaintiff would have received had the property of the corporation, upon its being wound up, been converted into money and applied to the payment of its debts *pro rata*.

In ascertaining the liabilities of the corporation neither rent accruing after the making of the prohibited transfer, nor the loss suffered by the lessor in reletting the premises at a lower rental, is to be included, since they do not constitute plaintiff a creditor who had suffered loss by reason of such transfer.

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The design and purpose of section 66 of the Stock Corporation Law being to secure equality among creditors, plaintiff cannot by means of the right of action given by said section be permitted to gain a preference which another creditor is prohibited from getting directly from the debtor by the same law.

That the court was without power to amend its original judgment in favor of plaintiff by increasing it to an amount in excess of that stated in the decision of the court; such amendment and increase were not the correction of a judgment for an "error in form or substance" within the meaning and intent of section 6(7) of the Municipal Court Code; nor was such amendment within the power of the court under section 724 of the Code of Civil Procedure.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, in favor of the plaintiff, and against the defendants Fontana and Boggiano for the sum of $936.33 and costs, and also from an order of the same court.

William Otis Badger, Jr. (Louis J. Wolff, of counsel), for appellants.

Rogers & Rogers (Gustavus A. Rogers and Saul E. Rogers, of counsel), for respondent.

WEEKS, J. This is an action brought by the plaintiff as a creditor of the De Luxe Feature Film Co., Inc., under section 66 of the Stock Corporation Law, to recover from the defendants, who were directors in said corporation, the loss sustained by reason of a transfer of its property to the defendant Fontana in payment of a debt.

It is not disputed that on February 21, 1916, all of the cash assets of said corporation, amounting to $428.09, were paid to the defendant Fontana by a check signed by the defendants Boggiano and Fontana, as president and treasurer respectively, for moneys theretofore advanced by said Fontana to the

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amount of $211, and as a payment of $217.09 on account of notes of said corporation held by him which were then past due; that on February 29, 1916, all the other assets of said corporation were sold by the defendant Boggiano for $821.25 and the entire proceeds thereof paid to defendant Fontana on account of said notes; that at the time such payments were made the corporation was in possession of an office under a written lease from the plaintiff, which did not expire until February 1, 1918, at a rental of $100 per month, payable monthly in advance, and that the rent due for the months of December, 1915, and January and February, 1916, had not been paid; that the plaintiff brought suit against said corporation on February 18, 1916, to recover for certain claims, including the rent under said lease for the months of December and January and recovered a judgment on March 10, 1916, for $369.81 upon which execution was duly issued and returned unsatisfied March 16, 1916; that said corporation also failed to pay the rent for the months of March and April, 1916, amounting to $200; that thereafter under the provisions of the lease the plaintiff relet the premises for account of the tenant at a reduced rental of $16.66 per month, which amounted for the unexpired term of the lease to $366.52, and that none of the indebtedness to plaintiff has been paid.

It also appears from the testimony of the defendants that the money paid to the defendant Fontana, amounting to $1,238.34, constituted the entire assets of the corporation and that there were no creditors of the corporation on February 21, 1916, other than the plaintiff, except the defendant Fontana to whom they were indebted in said sum of $211 and also upon three notes for $500 each, all dated October 6, 1915, and payable respectively one, two and three months after date.

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Decision was rendered by the trial court in favor of the plaintiff on November 6, 1916, for $936.33 and costs and judgment entered accordingly and thereafter an order was entered January 5, 1917, amending said judgment *nunc pro tunc* as of November 6, 1916, so that the same should be in the sum of $1,000 besides the costs and interest of this action, in pursuance of which judgment was entered for $1,096.51.

This appeal is taken from the original judgment and from the order amending same and also from the judgment, as amended.

The contention of the appellants that the Municipal Court had no jurisdiction of the subject matter of this action for the reason that the action, although one at law, is in reality equitable in its nature, is without merit.

The Municipal Court, by section 6, subdivision 1, of the Municipal Court Code, is given jurisdiction, with certain specified exceptions, of an action to recover damages for an injury to property, which is defined by section 3343, subdivision 10, of the Code of Civil Procedure, to be "an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

As stated in *Ghiglione* v. *Friedman,* 115 App. Div. 606: "It is plain from this definition that the expression 'injury to property' as used in the act, is to be given a broad and unrestricted meaning, so as to include every invasion of one's property rights by actionable wrong, and the decisions in this State have quite uniformly construed the expression in this manner. (*Buckley* v. *Mayor,* 30 App. Div. 463–466; *Stewart* v. *Lyman,* 62 id. 182–185; *Bogart* v. *Dart,* 25 Hun, 395; *Weiller* v. *Schreiber,* 63 How. Pr. 491; *Cleveland* v. *Barrows,* 59 Barb. 364.)"

The acts of the defendant unquestionably lessened the

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estate of the plaintiff and were made actionable by the statute.

The provisions of section 66 of the Stock Corporation Law under which this action was brought, so far as pertinent to the questions involved herein, are as follows:

"§ 66. Prohibited transfers to officers or stockholders. No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor of the corporation, shall be valid, * * *. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

In *Caesar* v. *Bernard*, 156 App. Div. 724; affd. on opinion below, 209 N. Y. 570, the court said, referring to the last provisions: "The liability created by this statute against directors and officers is for the loss sustained by creditors through wrongful acts of directors and officers, by which the funds of the corporation have been depleted, and

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instead of requiring that the action shall be brought by, or in the right of, the corporation to restore its funds, the Legislature gave a cause of action to the creditors and stockholders in their own right to recover the damages sustained."

In the case now under consideration it cannot be questioned that the corporation had failed to pay its notes when due and that the transfers were made to an officer and director in payment of a debt, and that it was actually insolvent, as its liabilities far exceeded its assets and it transferred all its property and discontinued business and that the transfers of its property were made with the intent of giving a preference and that such transfers were made by the defendants who were at the time officers and directors.

Even though it may be necessary for plaintiff to prove the assets and liabilities of the corporation at the time of the prohibited transfer in order to fix the amount of its damages, that fact does not go to the question of the jurisdiction of the court over the subject matter of this action.

Section 180 of the Municipal Court Code provides that: "every fair intendment shall be made in favor of its jurisdiction," and none of the cases cited by appellant in any way limit the application of that section where the question to be considered is whether the jurisdictional facts exist in any given case. This was clearly pointed out in *Mitchell* v. *Schroeder*, 94 Misc. Rep. 270; affd. on opinion below, 174 App. Div. 857.

Although we are satisfied that the court has jurisdiction and that the plaintiff established its right to recover, the amount of damages awarded by the trial court cannot be sustained.

The recovery is not to be measured by the amount of the debt but is limited to the *loss sustained.*

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As stated in *Caesar* v. *Bernard, supra:* "The Legislature manifestly intended to impose upon the directors and officers personal liability to creditors, not for the debts of the corporation, but so far as necessary to indemnify creditors 'to the full extent of any loss' sustained through the violation of the statute, and to that extent only. If the corporation retained sufficient assets to discharge its obligations to creditors, the latter would sustain no loss. The loss would be presumptively, I think, the amount for which an execution duly issued could not be satisfied in consequence of the disposition of property in violation of the statute."

At the time of the preferential transfers complained of the only amount then due from the corporation to the plaintiff was for installments of rent under the lease for the months of December, January and February, but, as the plaintiff had commenced its action for rent after February first without including a claim for the February rent, the judgment recovered is a bar to the recovery of the rent payable February 1, 1916. *Pakas* v. *Hollingshead,* 184 N. Y. 211; *Goldberg* v. *Eastern Brewing Co.,* 136 App. Div. 692; *Drexler* v. *Cohen,* 108 N. Y. Supp. 679; *Dusenbury* v. *Habisreitinger,* 72 Misc. Rep. 61.

As to the rent accruing after the preferential transfers and as to the loss suffered by plaintiff in reletting the premises at a lower rental, the plaintiff cannot be considered a creditor who had suffered "loss" by reason of such transfers.

The lease created a contingent liability which only ripened into a debt as the premises were used or as the rent of each month fell due. *Sanford* v. *Rhoads,* 113 App. Div. 782–784.

The authorities which construe other statutes fixing liability upon directors of corporations for *debts* con-

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tracted and payable within a limited period or *debts* existing at the time of making a report are not controlling in determining the liability of these defendants.

While it has been held, construing the statute under which this action has been brought, that the action can be maintained by a tort creditor although not a judgment creditor at the time of the transfers complained of (*Kain* v. *Larkin*, 4 App. Div. 209), it must also be shown that the liability of the corporation for the tort which was the basis of the judgment had accrued before the transfers were made. *Ginsberg* v. *Automobile Coaching Co.*, 151 App. Div. 627.

The plaintiff was undoubtedly a creditor at the time of the prohibited transfers. The only question to be determined is the "full extent of any loss" which it suffered by reason of the violation of the statutes.

As was said in *Lodi Chemical Co.* v. *National Lead Co.*, 41 App. Div. 535: "The policy underlying each statute is the same, viz.: 'The object to be accomplished by it is to secure equality among all creditors of a corporation, and to prevent fraudulent transfers in derogation or in fraud of their rights.' (*O'Brien* v. *East River Bridge Co.*, 36 App. Div. 24) * * *. The underlying purpose of the statute, therefore, being to secure equality amongst creditors, that purpose should be effectuated and not destroyed. * * * If the design and purpose of the 48th section (now § 66) is to secure equality among creditors, it would be inconsistent to allow one creditor, by means of the right of action given by the statute, to gain that preference through the law which another creditor is prohibited from getting directly from the debtor by the same law. It would be inconsequent to hold that by means of a suit, brought by one creditor against another, upon a statute intended to secure equality of

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distribution, the creditor suing could secure preference to himself and defeat the purpose of the statute."

This principle has been recently applied in *Curran* v. *Oppenheimer,* 164 App. Div. 746, in an action brought under sections 90 and 91 of the General Corporation Law. In that case, referring to *Darcy* v. *Brooklyn & New York Ferry Co.,* 196 N. Y. 99 (cited by respondent herein in support of the jurisdiction of the court), and *Hurd* v. *New York & Commercial Steam Laundry Co.,* 167 N. Y. 89, the court said, at page 749: "It is true, as stated in the authorities cited, that the assets of a corporation constitute a trust fund for the payment of its debts and that a creditor cannot be wrongfully deprived of his equitable lien thereon. But it by no means follows that the mere failure to formally go through dissolution proceedings entitles a creditor, in the absence of proof of fraud or bad faith, to recover from the directors the amount of his claim when it affirmatively appears that he would not have been entitled to the payment of any part of it had the corporation been thus dissolved. A creditor's remedy under a situation similar to that presented by this record, I think extends only to the property which would have been, but for the action of the directors, applicable to the payment of his claim. If this be so, then all that remains is to ascertain how much, if anything, the plaintiff would have received in case the corporation had been formally dissolved."

In *Pennsylvania R. R. Co.* v. *Pedrick,* 234 Fed. Repr. 781–786, the court said: "The defendants contend that, before plaintiff could maintain its action to recover its 'loss' from the directors, there must have been an accounting to ascertain such loss, and that the 'loss' could not be proved by evidence taken on this trial. I cannot so construe this statute. There is

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always difficulty in proving the damages in such a case, but I think the 'loss' sustained was the sum plaintiff would have received, had the corporation been wound up and its property, so far as improperly transferred, converted to money and applied to the payment of its debts *pro rata.*"

In the instant case there is no difficulty in determining the full extent of the loss suffered by the prohibited transfers.

The defendant Fontana was at the time a creditor of the corporation for money advanced for salaries and upon three notes, all past due, amounting on February 29, 1916, to $1,731.76. The plaintiff in its action, which was then pending, subsequently recovered a judgment for $369.81. The total debts of the corporation therefore amounted at that time to $2,101.57. The total assets of the corporation were $1,249.34. The amount of plaintiff's loss therefore was $219.84, for which amount, with interest from February 29, 1916, judgment should have been awarded.

The order entered January 5, 1917, amending the judgment of November 6, 1916, and increasing the amount of recovery from $936.33 and costs, "so that the same shall be in the sum of $1,000 besides the costs and interest," was without authority.

The time within which the court was required to render judgment under section 119 of the Municipal Court Code had been extended by stipulation to November 6, 1916, on which date the decision was rendered in favor of plaintiff for $936.33, which was the total amount of plaintiff's claim less $100, and judgment was entered thereon for $994.33.

The second cause of action set forth in the complaint was for the February rent amounting to $100 and a specific motion had been made to dismiss the complaint as to that cause of action.

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Although the affidavit upon which the motion to amend was granted stated that, in submitting his brief, counsel "inadvertently gave the figures for which judgment was asked for, in the sum of $936.33," we cannot assume that in rendering a decision for a specific amount *without interest* the court was unmindful of the claim as to which evidence had been presented and of the fact that the complaint claimed that plaintiff was entitled to an amount larger than the amount awarded *together with interest,* especially as the exact difference was the amount of one of the alleged causes of action.

The order appealed from resulted in the entry of a judgment which is not in accord with the only decision rendered by the court and which was not entered until nearly six weeks after the expiration of the time within which defendants were required to appeal from the judgment in order to protect their rights.

Manifestly the court had no power, nearly two months after the entry of the judgment, to amend the judgment by increasing it to an amount in excess of the amount stated in its decision. *Vitale* v. *Gants,* 123 N. Y. Supp. 45, citing *Heath* v. *New York Building Loan Banking Co.,* 146 N. Y. 260.

As stated in *Heinitz* v. *Darmstadt,* 140 App. Div. 252, 253: "A trial court may not, after the final judgment, by amendment, change a ruling upon the law, or alter the decision upon the merits, for by so doing, the substantial rights of the adverse party would be really affected." *Bohlen* v. *Metropolitan E. R. Co.,* 121 N. Y. 546; *Smith* v. *Smith,* 121 App. Div. 480.

The amendment and increase of the judgment in the instant case was not the correction of a judgment for an "error in form or substance" within the meaning and intent of section 6, subdivision 7, of the Municipal Court Code. Such errors, as was pointed out in

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Petsche v. *MacDonald*, 94 Misc. Rep. 655; "must be found in the record itself." Nor was such an amendment within the power of the court under section 724 of the Code of Civil Procedure, now applicable to the Municipal Court, which is limited to cases arising from the mistakes, inadvertence, surprise or excusable neglect *of the party seeking relief*. *Lackner* v. *American Clothing Co.*, 112 App. Div. 438, 441; *Barron* v. *Feist*, 51 Misc. Rep. 589.

BIJUR and HENDRICK, JJ., concur.

The order amending the judgment must, therefore, be reversed, without costs, and the judgment as amended must be vacated, and the judgment of November 6, 1916, modified, with $25 costs to appellant, by reducing the same to the sum of $219.84, with interest from February 29, 1916, with proper costs in the court below.

EAGLE PAPER BOX COMPANY, Respondent, *v.* GATTI-McQUADE COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, April, 1917.)

Statute of Frauds — memorandum in writing insufficient to avoid the — sales — contracts — evidence — Personal Property Law, § 85(2).

A correspondence consisting of a letter from plaintiff to defendant and received by it, stating that plaintiff had placed an order with defendant's agent for certain goods of specified sizes to be shipped at certain times, and a postal card sent two days later by defendant to plaintiff, acknowledging an order of the previous day but in no way connected with the letter or the order given to the agent, except by oral testimony, is not a sufficient memorandum in writing to avoid the Statute of Frauds.

All the essential parts of an agreement of sale must be contained in the writings between the parties and cannot be supplied by oral testimony.

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It clearly appearing that the goods were not to be manufactured by defendant, the contract was not enforcible under section 85(2) of the Personal Property Law which was added thereto by chapter 571 of the Laws of 1911.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of the plaintiff for $1,063.

Smith & Bowman (Harold H. Bowman, of counsel), for appellant.

Arnstein & Levy (Herman Joseph and Charles Goldzier, of counsel), for respondent.

WEEKS, J. This action is brought to recover damages for the failure of defendant to deliver fifty-four tons of chip board under an oral contract made on January 26, 1916, as to which it was claimed written communications were thereafter had.

In addition to a general denial, defendant pleaded the Statute of Frauds as an affirmative defense.

The plaintiff claims that the case does not come within the statute because the goods were not in existence when the contract was made and were to be manufactured especially for the buyer, and were not suitable for sale to others in the ordinary course of the seller's business, and further claims that, even if the case comes within the statute, there was a sufficient note or memorandum in writing of the contract or sale signed by the defendant.

Although there was little, if any, proof that the salesman was authorized to accept the order, and although there was strong evidence that the postal card acknowledging "an order of the 27th inst." referred to an order for other goods and did not have any reference to the order of January twenty-sixth

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upon which this action is founded, and although the proof to meet the "special order test" may have been of doubtful sufficiency, the determination of the trial court must be considered as resolving these disputed questions of fact in favor of the plaintiff.

In order to support the making of a memorandum in writing the plaintiff relied upon a letter written by it and received by the defendant as follows:

"NEW YORK, *January* 26, 1916.

"GENTLEMEN.—We placed an order with your Mr. Massa, for fifty ton of light color chip; kindly make that fifty-four ton. The following are the sizes and quantity, of each size, to be made:

4	ton	24 x 35	No. 60
4	"	26 x 44	" 40
4	"	26 x 50	" 35
2	"	29 x 41	" 45
4	"	26 x 38	" 40
4	"	26 x 38	" 40
4	"	34 x 46	" 32
4	"	34 x 52	" 26
4	"	34 x 58	" 23
4	"	29 x 46	" 35
2	"	26 x 38	" 70
2	"	26 x 38	" 60
2	"	29 x 44	" 55
2	"	32 x 42	" 40
2	"	32 x 44	" 50
2	"	29 x 42	" 50
2	"	34½ x 43	" 26
2	"	26 x 35	" 48

the above to be light color chip, grain running the long way, board must be stiff and dry, with a rough finish.

"Half of each quantity, and each size of the order must be shipped in at once. The other half of the order, to be shipped in on February 25th, 1916."

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And a postal card, post marked January 28, 1916, 9:30 P. M., sent by defendant to plaintiff as follows:

"HOBOKEN, N. J., 1/27, 1916.

"We acknowledge with thanks your esteemed order of the 27th inst., which will receive our immediate attention."

This postal card is not connected with the contract or letter except by oral testimony.

It is clear that this correspondence does not constitute a sufficient memorandum in writing to avoid the operation of the statute.

All the essential parts of the agreement must be contained in the writings and they cannot be supplied by oral evidence. *Stone* v. *Browning,* 68 N. Y. 598; *Waxelbaum* v. *Schloss,* 131 App. Div. 826. The price to be paid or some stipulated means of fixing it is an essential element of such a memorandum. *Lambert* v. *Hays,* 136 App. Div. 574; *United Press* v. *New York Press Co.,* 164 N. Y. 406; *Inman* v. *Burt Co.,* 124 App. Div. 73.

Whether the Statute of Frauds applies to the contract sued upon must be determined by the language of the present statute which is to be found in section 85 of chapter 571, Laws of 1911, taking effect September 1, 1911, popularly called the Uniform Sales Act, and forming part of the Personal Property Law.

Subdivision 2 of that section reads as follows:

"2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be acutally made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are

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not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

The language of this section is identical with the corresponding section in the Uniform Sales Act which has been adopted in many of the states.

In reporting this act, of which he was the draftsman, to the American Bar Association, Professor Williston said, with reference to this provision: "The first half of subsection (2) is taken from the English Act which has enacted the rule laid down by *Lee* v. *Griffin,* 1 B. & S. 272. Though this rule is the most scientifically exact, and has been so recognized by writers (*e. g.,* Benjamin on Sales, Sec. 103), it has found little support in this country, even in cases decided since *Lee* v. *Griffin.* The qualification here added to the English subsection is intended to reproduce the rule laid down by Shaw, C. J., in *Mixer* v. *Howarth,* 21 Pick. (Mass.) 205, and by Ames, J., in *Goddard* v. *Binney,* 115 Mass. 450. The New York rule is still different, and in other states the line may not always be drawn at exactly the same point. The authorities are collected in Mechen, Sections 304–326, and the conclusion drawn in Section 326 seems justified by the cases and justifies the form of this proposed draft: 'The Massachusetts rule seems likely to be received with favor wherever the courts are not debarred by earlier decisions from adopting it.'"

Prior to the enactment of the present statute the authorities in this state had held that a contract for the delivery of goods to be manufactured *by* the vendor was a contract for work and labor and not within the statute, but if the goods were to be manufactured *for* the vendor by others the contract was a contract of sale and was within the statute unless the article manufactured was not vendible in the general market.

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Millar v. *Fitzgibbons,* 9 Daly, 505; *Joy* v. *Schloss,* 12 id. 533; *Courtright* v. *Stewart,* 19 Barb. 455; *Juilliard* v. *Trokie,* 139 App. Div. 530; affd., 203 N. Y. 604.

In *Morse* v. *Canasawacta Knitting Co.,* 154 App. Div. 351, however, it was held by a divided court that in the case of an article manufactured according to certain specifications, so that it could not be readily held in stock and sold to others: "The distinction between articles to be manufactured by the vendor himself or to be by him procured to be manufactured by another party, should only be held upon imperative authority."

As the judgment appealed from in that case was entered July 28, 1911, it cannot be regarded as construing the present statute, in which the distinction is clearly indicated by the use of the words "manufactured *by the seller.*" This removes all ambiguity and leaves no room for doubt, unless all recognized rules for construction are to be disregarded. If it were intended to make the statute inapplicable to a sale of goods not in existence, provided they were manufactured especially for the buyer and were not suitable for sale to others in the ordinary course of the seller's business, without regard to whether they were manufactured *by the seller* or by some other person, the addition of these words would have been not only unnecessary but misleading. That the distinction was clearly in mind when the statute was enacted is shown by the definition of "future goods" to be found in the following section as "goods to be manufactured *or acquired* by the seller after the making of the contract to sell."

As said by Judge Finch in *People ex rel. Freligh* v. *Matsell,* 94 N. Y. 179, at page 183: "In the construction of a statute, effect must be given, if possible, to all the language employed," and as this provision

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of the statute was beyond question intended to incorporate therein the Massachusetts rule, the authorities of that state are especially illuminating if not controlling.

In *Smalley* v. *Hamblin,* 170 Mass. 380, decided February, 1898, the court said: "In *Goddard* v. *Binney,* 115 Mass. 450, many of our decisions, as well as some of those of England and of New York, are reviewed, but there is no express decision here with reference to the effect of an understanding that the articles are not to be manufactured by the vendor, but are to be procured by him of some other person who manufactures and sells them, and are to be delivered by the vendor to the purchaser for an agreed price as completed articles of merchandise. Where this fact has appeared, it usually has been considered that the transaction is a sale of merchandise. We think that it must be so held in this case. *Edwards* v. *Grand Trunk Railway,* 48 Maine, 379. *Pitkin* v. *Noyes,* 48 N. H. 294. *Prescott* v. *Locke,* 51 N. H. 94. See *Donaher* v. *Boston,* 126 Mass. 309; *Bacon* v. *Parker,* 137 Mass. 309; *Tracy* v. *Wetherell,* 165 Mass. 113."

The only reported decisions in this state in cases arising since the amendment of 1911 are *Davis* v. *Blanchard,* 138 N. Y. Supp. 202, and *Schneider* v. *Lezinsky,* 162 id. 769, in both of which the goods were to be manufactured by the seller. In the case of *Goldowitz* v. *Kupfer & Co.,* 80 Misc. Rep. 487, an examination of the record shows that the contract sued upon was made in 1910 and no question was raised as to whether the goods were to be manufactured by the seller or another.

In the instant case it is clear that the goods were not to be manufactured by the defendant.

No proof was offered that the plaintiff expected or understood that the goods were to be the product of

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the personal skill and labor of the defendant or its employees or that it made any difference where the defendant procured the board or even whether it was then on hand, and in fact the letter of plaintiff required one-half of the order to be shipped in *at once*, and it is uncontradicted that the defendant owned no paper mill and that it attempted to have the goods manufactured by a corporation in which the defendant was not interested except as a creditor.

It follows, therefore, that the judgment must be reversed, with thirty dollars costs, and complaint dismissed upon the merits, with costs in the lower court.

BIJUR and HENDRICK, JJ., concur.

Judgment reversed, with costs.

JOHN MANGELS, Respondent, *v.* HOLLAND, SPAR & CO., INC., Appellant.

(Supreme Court, Appellate Term, First Department, April, 1917.)

Appeal — when does not lie — Municipal Court of city of New York — judgments — when motion to amend reviewed.

An appeal does not lie from an order of the Municipal Court of the city of New York denying a motion to amend a judgment.

While the Municipal Court of the city of New York may amend a judgment so as to provide that the plaintiff was liable to arrest on an execution, the question whether the denial of a motion to so amend was a proper exercise of power can only be reviewed on an appeal from the judgment.

APPEAL by the defendant from an order of the Municipal Court of the city of New York, borough of Manhattan, fifth district, entered in favor of the plaintiff.

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Julius Walerstein (Arthur S. Levy, of counsel), for appellant.

Benj. Frindel, for respondent.

HENDRICK, J. The defendant herein appeals from an order of the Municipal Court which denied his motion to amend the judgment so as to provide that the plaintiff was liable to arrest and imprisonment upon execution.

This application was made within the time provided in section 129, subdivision 4, of the Municipal Court Code and was denied. The appeal must, nevertheless, be dismissed. Appeals from the Municipal Court are governed by the provisions of section 154 of the Municipal Court Code. No authority is given therein for the taking of an appeal from an order of this character. The court below, undoubtedly, had power and jurisdiction to make an order amending the judgment. Whether or not it exercised such power correctly would be the question to be determined upon appeal, but the order does not fall within that class of orders mentioned in section 154 of the Municipal Court Code, subdivision 8, as being one which the "court had not the power to make." The appeal should have been taken from the judgment and the notice of appeal should have specified the order which was sought to be reviewed. Mun. Ct. Code, § 155.

BIJUR and WEEKS, JJ., concur.

Appeal dismissed, with ten dollars costs.

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FRANK J. VALENTI, Plaintiff, v. NEW YORK THEATRE COMPANY et al., Defendants.

(Supreme Court, New York Special Term, April, 1917.)

Lease — landlord and tenant — what is meaning of "consent" — contracts — evidence — Lien Law, § 3.

There is a marked distinction between the passive acquiescence of an owner of property in that he knows improvements, which in many cases he had no right to prevent, are being made thereon, and his actual and express consent that the improvements shall be made; it is the latter that constitutes the "consent" mentioned in section 3 of the Lien Law.

A mere general consent on the part of the owner that the lessee may at his own expense make alterations and repairs does not constitute "consent" within the meaning of the statute.

Mere knowledge does not imply consent within the meaning of the statute nor do expressions of satisfaction with the work, where the landlord exercises no control or supervision over the performance of the contract.

The lease of a roof garden, rented for a motion picture theatre, contained a direct notice to every materialman and contractor that the landlord would not be liable for any work done or materials furnished unless the conditions provided for in the lease were complied with in order to hold the landlord for liens or to liability. The landlord upon the express condition that the tenant should remain primarily liable for the rent consented to the assignment of the tenant's rights under the lease and after the undertenant had entered into possession of the roof garden, which it used for ball room purposes, it contracted for its decoration with plaintiff who in an action to foreclose a mechanic's lien for the balance due him on the contract sought to hold the landlord liable on the ground that its officers and agents knew of the prosecution of the work from which it secured no material advantage and that certain plans were in the possession of its attorney. *Held*, that the evidence was insufficient to establish the landlord's "consent" to the improvement, within the meaning of the Lien Law.

An additional lien claimed by plaintiff for work done in fitting up the billiard room in the basement of the building

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under an oral agreement made with the undertenant cannot be sustained, the original tenant of the roof garden never having been a tenant of the basement.

ACTION to forclose a mechanic's lien.

Louis O. Van Doren, for plaintiff.

David Gerber, for defendants.

COHALAN, J. In an action to foreclose a mechanic's lien judgment is asked against the defendant New York Theatre Company. This corporation owns the large theatre property between Forty-fourth and Forty-fifth streets on Broadway in the borough of Manhattan, and leases portions of it to various tenants. The roof garden, under lease dated January 11, 1915, was leased to William Morris. He defaulted in the payment of rent, but on September 27, 1915, by a second agreement the lease of January 11, 1915, was reinstated. Morris thereafter assigned his lease to the defendant corporation Fifteen Twenty Broadway, Inc. This agreement was made on the consent of the New York Theatre Company upon the express condition that Morris, the original tenant, should remain primarily liable for the rent. An examination of the leases and other agreements in evidence shows that the landlord guarded itself against the making of improvements on the property in the following ways: (1) That no improvements should be made without first obtaining the written consent and approval of the landlord; (2) that the plans for the same should be submitted to it for consideration; (3) that there should be an approval of these plans; (4) that an indemnity bond should be given against any possible liens against the property, and (5) that there should be a waiver from any contractor with whom the tenant or anybody else dealt in respect of any work to be

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done or materials to be furnished. The undertenant used the roof garden for ballroom purposes, which line of activity apparently turned out to be a failure, in consequence of which, by legal proceedings, there was an eviction of the tenant and his sublessee, Fifteen Twenty Broadway, Inc. After the latter corporation entered into possession of the roof garden it contracted for the decoration of the same with the plaintiff herein. It is undisputed that the work was performed; that the price for the same was reasonable, and that only the sum of $1,700 has been paid on account thereof. The plaintiff seeks to hold the landlord for the payment of the balance due him on the ground that the officers and agents of the New York Theatre Company knew of the prosecution of this work, and that liability flows from such knowledge. In brief, that there was an acquiescence, an inspection and approval of the plaintiff's work, and that the New York Theatre Company is the beneficiary of it. The plaintiff relies for the support of his theory upon the statute (Lien Law, § 3) and the cases of *National Wall Paper Co.* v. *Sire,* 163 N. Y. 122; *Schmalz* v. *Mead,* 125 id. 188, and *Miller* v. *Mead,* 127 id. 544. But these cases, particularly the case of *National Wall Paper Co.* v. *Sire, supra,* are not so pertinent, in view of the later decisions upon the subject under consideration. The higher courts have frequently passed upon the word "consent," as used in the statute. It has been decided that the "mere acquiescence, the erection or alteration with knowledge," is not the evidence of consent which the statute requires. It has been held that there must be something additional; that consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner. It is affirmative in its nature. *DeKlyn* v. *Gould,* 165 N. Y. 282; *Rice* v. *Culver,* 172 id. 60.

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In the case of *De Klyn* v. *Gould, supra*, the court said: "The owner's interest in his real estate is not liable in every case in which to his knowledge labor and materials are furnished for erections upon his real property or alterations in the existing erections (cases cited). There are many cases in which the owner's consent has been implied from the circumstances and his declarations and acts in respect to the improvements. The appellant largely relies upon *National Wall Paper Co.* v. *Sire*, 163 N. Y. 122, and the cases therein cited, in which the owner's consent was inferred or implied. In that case it was pointed out by O'Brien, J., writing for the majority of the court, that by the terms of the lease the tenant was under no obligation to make the improvements: he was permitted to make them at his own expense; that before the tenant engaged the contractor to make them he conferred with the lessor, exhibited to him a specimen room of the decorations he intended to make throughout the whole house, and told him that he ought to pay part of it, and the lessor replied, 'Well, I will see how well it is done;' that the lessor was in attendance during the progress of the work, and frequently expressed his admiration and approval, and in a few weeks after the completion of the work dispossessed his tenant. The case before us lacks these features and has no element tending to show that the lessor misled her tenant to his extravagant outlay. This case, as well as the others he cites, indicates that mere acquiescence in the erection or alteration, with knowledge, is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner. It is affirmative in its nature. It should not be implied contrary to the obvious truth,

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unless upon equitable principles the owner should be estopped from asserting the truth." In the case of *Rice* v. *Culver,* 172 N. Y. 60, the court said: "The work for which the plaintiff's lien was filed consisted of plumbing work and material, and was furnished under a contract between her and the exhibition company dated April 27 * * *. The question to be determined in this case is the meaning to be given to the term 'consent.' Doubtless, in a certain sense of the word, the appellant did consent to the performance of the work done on his property, for at the time of the execution of the lease he must have known that the lessee intended to make erections thereon in order to use the premises for the purposes for which they were let. But a similar situation is presented in the great majority of demises of real property. If there is a building on the premises the tenant is, in the absence of an express covenant on the subject, required to keep the premises in ordinary repair. (Taylor on Landlord & Tenant, sec. 43; *Suydam* v. *Jackson,* 54 N. Y. 450.) It seems that in this state a tenant may erect a new edifice on demised premises, provided it can be done without destroying or materially injuring other improvements, without the consent of the landlord or being subject to the charge of waste. (*Winship* v. *Pitts,* 3 Paige, 259.) Even in the case of existing structures, while the law precludes with some strictness the tenant from making alterations, there is a large field in which he may, without the permission of the landlord, make improvements beneficial to his use, unless they constitute a permanent injury to the estate. It could not have been intended by the legislature (if it had the power) to enact that by the mere demise of land the property of the owner should be subjected to the cost of structures or improvements which the tenant would have the right to erect by

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virtue of his estate under the lease. There is a marked distinction between the passive acquiescence of an owner in that he knows the improvements are being made, improvements which in many cases he had no right to prevent, and his actual and express consent or requirement that the improvement shall be made. It is the latter that constitutes the consent mentioned in the statute. To fall within that provision the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises, assent to the improvement in the expectation that he will reap the benefit of it. * * *" The fact that some of the officers and agents of the New York Theatre Company were present in the roof garden during the progress of the work and the further fact that certain plans were in the possession of an attorney for the landlord are not sufficient in this case to make the consent and the acquiescence effective. A mere general consent on the part of the owner that the lessee may at his own expense make alterations and repairs does not constitute consent within the meaning of the Lien Law. Mere knowledge does not imply the consent mentioned in the statute, nor do expressions of satisfaction with the work where the landlord exercises no control or supervision over the performance of the contract. *Hedlund* v. *Payne*, 60 Misc. Rep. 603. Moreover, the lease contained a direct notice to every materialman and contractor that the landlord would not be liable for any work done or materials furnished unless the conditions provided for in the lease were complied with in order to hold the landlord for liens or to liability. The plaintiff knew that Fifteen Twenty Broadway, Inc., was not the owner of the premises. He was therefore put upon inquiry to ascertain that corporation's rights as lessee. *Hankinson* v. *Vantine*, 152 N. Y. 20; *Spruck* v.

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McRoberts, 139 id. 193. While it is not important to the decision of this case as to whether or not the landlord secured any benefits from the work done, yet there is evidence to show, after the eviction of the sub-tenant, the character of the premises was changed. The roof garden was rented not for ballroom purposes or dancing, but for a motion picture theatre, and for that purpose the room was turned into an auditorium, with seats. This fact being true, the landlord did not secure any material advantage by the decorations which were made. The plaintiff claims an additional lien for work done in fitting up the billiard room in the basement of the building. There is no evidence in the case of any lease on behalf of the New York Theatre Company to any one of this billiard room. The agreement with respect to its decoration was orally made with representatives of Fifteen Twenty Broadway, Inc. I am of opinion, therefore, that because Morris, the original lessor, was never a tenant of that portion of the building, the lien for the work performed therein may not be sustained. On the whole case the complaint, so far as the New York Theatre Company is concerned, is dismissed.

Ordered accordingly.

PEOPLE ex rel. POSTAL-TELEGRAPH CABLE COMPANY, Relator, *v.* STATE BOARD OF TAX COMMISSIONERS, Defendant.

(Supreme Court, New York Special Term, April, 1917.)

Taxes — on franchises — corporations — when assessment invalid — statutes — certiorari.

Where a corporation has received franchises from both the state and federal governments, an assessment for the purposes of state taxation which includes both is invalid unless capable of separation.

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Telegraph companies which have accepted the provisions of the United States statute entitled "An act to aid in the construction of telegraph lines," giving to such companies the right to use the post-roads, have thereunder derived some rights or franchise from the federal government with which the states cannot interfere, and if such franchise or right is included in the assessment of their special franchise under the statute of the state of New York providing for the taxation of special franchises the assessment is invalid.

As the state board is directed by the New York Tax Law to assess as part of the special franchise "all franchises, rights, etc.," to use the streets, it must be assumed to have included in its valuation the rights derived under the United States statute and as the items cannot be separated the assessment, so far as the intangible property is concerned, cannot be sustained.

CERTIORARI to review an assessment for the year 1912 of relator's special franchise.

Henry G. Fritsche and George H. Mallory, for relator.

Lamar Hardy, corporation counsel, and A. B. Scovill, for city of New York.

Egburt E. Woodbury, attorney-general, and Leonard J. Obermeier, for the state.

PENDLETON, J. This is a certiorari proceeding to review the assessment for the year 1912 of the relator's special franchise consisting of telegraph lines constructed and operated in, under or along the streets, highways or public places in the city of New York with the franchise or right to maintain and operate the same in and over said streets and highways.

Relator is a telegraph company incorporated under the general laws of the state of New York for the incorporation of telegraph companies which provide that corporations organized thereunder are author-

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ized to construct telegraph lines along and upon any of the public roads and highways.

The Revised Statutes of the United States, section 5263 (originally Laws of 1866, chap. 230), provides: "Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.

"§ 5266. Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

"§ 5267. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes,' or under this

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Title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"§ 5268. Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."

Relator filed its acceptance of the provisions of this act as therein provided.

There is no dispute that the public streets and highways in the city are post-roads of the United States within the meaning of this statute.

The state board, in assessing relator's special franchise in the city of New York, fixed the value of the tangible property at $232,587, and the intangible at $166,120, and the relator now presents for decision in these proceedings as the only question that the assessment of its special franchise for taxation is invalid because it includes in the value of the intangible property the franchise given to it by the federal statute which it is not within the power of the state to tax.

There is no dispute that a state cannot tax franchises derived from the federal government, and where a corporation has received franchises from the state and federal governments an assessment for the purposes of state taxation which includes both is invalid unless capable of separation.

In *California* v. *Central Pacific R. Co.*, 127 U. S. 1, assessments were made by the state board of California of the franchise, roadbed, rails and rolling stock of the Central Pacific Railroad Company and of the Southern Pacific Railroad Company in a gross amount for each corporation. Both corporations were incor-

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porated under the laws of California, but had also received rights and powers or franchises under statutes of the United States. It was held that a state cannot tax franchises granted by the United States and that, as the assessment included the value of such franchises and that these values were so blended with the other items of which the assessment was composed that they could not be separated, the assessments were void.

It is well settled that the statute in question did not vest in the corporations availing themselves of its provisions the right of eminent domain, and that the right of franchise given is as to post-roads and properties not owned by the United States subject to the rights of the owners of the fee. *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 195 U. S. 574; *St. Louis* v. *Western Union Tel. Co.*, 148 id. 92; *Western Union Tel. Co.* v. *City of Richmond*, 224 id. 160. It did, however, subject to such rights, vest in the companies a right or franchise to use such post roads with which right the state cannot interfere. *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 195 id. 540, 564.

In *Western Union Tel Co.* v. *Massachusetts*, 125 U. S. 530, it was held that a statute of the state authorizing an injunction to prevent corporations from doing business within the state for non-payment of taxes in arrears is void so far as it assumes to confer power upon a court to restrain a telegraph corporation, which has accepted the provisions of the act of congress, from operating its lines over the post-roads of the United States.

In *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, it was held that a telegraph company, which had accepted the provisions of the act and acquired permission from a railroad company to

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operate along its line, could not be prevented from so doing by any act of the state, and in *United States* v. *Union Pacific R. R. Co.*, 160 U. S. 1, it was held that a contract by a railroad company to exclude a telegraph company which had accepted the provisions of the act from the use of its lines, being post-roads, was invalid. That the act vested important rights in the companies is clearly stated in *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 195 U. S. 540, 567. The court says: "If the act grants no rights, it is urged, except by permission of the railroad companies, it confers no more than can be obtained from the railroad companies. The objection is best answered by examples. The telegraph company had such permission in the *Pensacola* case. It needed, however, the act of 1866 to make its exercise effectual against the legislation of the State of Florida. In the *Union Pacific* case a claim of a monopoly by one telegraph company was answered by the act construed as a grant of rights to all companies. These examples show important results achieved by the act, and the principles of the cases may come to be applied to prevent other hostile action of States or individuals."

In *Western Union Tel. Co.* v. *Wright*, 185 Fed. Repr. 250, the state board conceded that the value of the rights derived under the act of congress was included in the assessment and it was held invalid.

In *City & County of San Francisco* v. *Western Union Tel. Co.*, 17 L. R. A. (Cal.) 301, it was held that an assessment of "franchises" included that granted by the United States statute in question and was therefore invalid.

That the assessment in this case of relator's intangible property included the right or franchise derived under the United States statute seems clear.

The Tax Law defines the terms "land," "real

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estate " and " real property " as used for purposes of taxation to " include * * * all telegraph lines, wires, poles and appurtenances * * * and all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity, or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, *including the value of all franchises, rights, authority or permission to construct, maintain, or operate, in, under, above, upon, or through, any streets, highways or public places, any mains, pipes, tanks, conduits or wires,* with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephone or other purposes," and the same section defines a special franchise as follows: " A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a ' special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise." Consol. Laws, chap. 60, § 3. Section 43 provides that " The state board of tax commissioners shall annually fix and determine the valuation of each special franchise."

By section 43 of the Tax Law, as amended by chapter 712 of the Laws of 1899, now substantially reproduced in section 44 of the Tax Law, it is provided that: " Every person, copartnership, association or corporation subject to taxation on a special franchise, shall within thirty days after this section takes effect, or

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within thirty days after such special franchise is acquired, make a written report to the state board of tax commissioners containing a full description of every special franchise possessed or enjoyed by such person, copartnership, association or corporation, a copy of the special law, grant, ordinance or contract under which the same is held, or if possessed or enjoyed under a general law, a reference to such law." Under this provision of the statute relator filed a report in which it stated that its only special franchise was the one derived by it under the United States statute above referred to. In the notice served on relator by the state board as required by law, it is stated that the state board has " made the valuation of the special franchise constructed, maintained or operated by relator at its full and actual value, etc."

As the state board is directed by the statute to assess as part of the special franchise all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon or through any streets or highways or public places, it must be assumed, especially in view of the report and notice above set forth, that it included in its valuation the rights or franchises derived under the United States statute, and as the items cannot be separated the assessment, so far as it concerns the intangible property, is invalid.

Western Union Tel. Co. v. *Massachusetts,* 125 U. S. 530; *Massachusetts* v. *Western Union Tel. Co.,* 141 id. 40, and *Western Union Tel. Co.* v. *Gottlieb,* 190 id. 412, are in no wise in conflict with these views. In all those cases it was held that the particular tax or assessment there involved was on proporty only, exclusive of any franchise rights as such and that, being a tax on such property only, the assessments did not include the value of the franchise given by the act of

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congress and were therefore valid. Here, the tax is on property including all franchises to use the streets and highways and the assessment is specifically made to include the value of all such franchises. Calling it real estate does not help the matter; if not within the taxing power of the state it cannot be made so by a name.

It may be conceded that a state tax or an assessment limited to the franchise granted by the state would be valid and that the state might make a reasonable charge for the use of the street or so much thereof as is physically occupied by way of a rental or charge per pole or length of line laid in the street (*St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 100; *Western Union Tel. Co.* v. *City of Richmond*, 224 id. 160), but such is not this case. The tax neither purports to be such a charge nor is such in its nature. It is a tax pure and simple on property consisting of certain tangible and intangible property, the latter representing all and every franchise to use the streets. That the value of the latter is determined by the net earning method (*People ex rel. Jamaica Water Supply Co.* v. *Tax Commissioners*, 196 N. Y. 39) is a circumstance tending to show that the tax is not in the nature of rent.

It has been suggested that the words "subject to assessment in each city, town or village" in section 43 of the tax act above quoted should be construed as meaning legal assessment, and that as the franchise under the act of congress is not legally assessable it should be deemed excluded by force of this provision. I do not think, however, the wording of the clause will bear any such construction; its manifest meaning is that the assessment shall be made for the locality in which property is situated.

Judgment accordingly.

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PEOPLE ex rel. COMMERCIAL CABLE COMPANY, Relator, v. STATE BOARD OF TAX COMMISSIONERS, Defendant.

(Supreme Court, New York Special Term, April, 1917.)

Taxes — imposition of — special franchises — what is property state may tax — when writ of certiorari dismissed.

While a state cannot impose a tax upon commerce between the states or with foreign countries, it may tax real and personal property within its borders although used in interstate or foreign commerce, and a franchise to use the streets and highways granted by the state is property a state may tax.

Whether a tax is on property and valid or a burden on interstate or foreign commerce and invalid is to be determined by the operation and effect of the tax and not by the form of the statute and depends on whether or not the tax is for the privilege of engaging in interstate or foreign commerce or directly reaches the transactions in such commerce or the profits or benefits to be derived therefrom or fluctuates or varies according to the volume of business done in such commerce.

The tax on special franchises under the New York Tax Law is a tax on property and valid even where the corporation is engaged exclusively in interstate or foreign commerce.

Where the property is part of a larger earning unit, the net earnings of the whole form no proper basis for determining the earnings of the part if the mileage included in the special franchise is the means of reaching the central point from which business emanates and to which it converges.

CERTIORARI to review the assessment of relator's special franchise for year 1912.

Henry G. Fritsche and George H. Mallory, for relator.

Lamar Hardy, corporation counsel, and A. B. Scovill, for city of New York.

Egburt E. Woodbury, attorney-general, and Leonard J. Obermeier, for state.

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PENDLETON, J. This is a certiorari proceeding to review the assessment of relator's special franchise for the year 1912.

Relator is a corporation organized under the laws of the state of New York which give it the right or franchise to maintain and operate telegraph lines along or upon the streets or highways. Relator's business is exclusively a part of commerce between this country and foreign countries.

The special franchise consists of the wires, conduits and appurtenances in the streets and waters of the city of New York and the franchise to maintain and operate the same.

Relator contends that the assessment is invalid as an attempt by the state to regulate foreign commerce and that the assessment is excessive.

It is well settled that a state cannot interfere with or regulate commerce between the states or with foreign countries but may tax real and personal property within the state belonging to corporations engaged in interstate or foreign commerce, and that franchises or rights to be a corporation and use the streets and highways granted by the state are property which a state may tax. *Telegraph Co.* v. *Texas,* 105 U. S. 460; *Baltic Mining Co. v. Massachusetts,* 231 id. 68; *Met. St. Ry. Co.* v. *N. Y.,* 19 U. S. 1. In *Kansas City Ry.* v. *Kansas,* 240 U. S. 228, it was held that a state cannot impose a tax on interstate commerce either by imposing it on the business constituting such commerce or the privilege of engaging in it or upon receipts derived from it, but may impose a tax on the privilege or franchise of being a corporation, and that in each case whether a state tax has such direct relations to foreign or interstate commerce as to be invalid as a tax or burden thereon depends on the operation

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and effect of the tax as enforced and not upon the name given to it. The validity of each tax must be decided upon its own facts. In considering whether a statute does or does not burden interstate commerce the courts will look beyond mere form and consider the substance of things. *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1.

What is a tax on property and valid, and what a burden on interstate or foreign commerce and invalid, has been frequently before the courts. In *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 550, the court says: " 'It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property.' "

The proper test as to whether a tax is imposed on interstate or foreign commerce or only on property of a corporation engaged in such commerce would seem to be whether or not the tax is for the privilege of engaging in interstate or foreign commerce or directly reaches the transactions in such commerce or the profits or benefits to be derived therefrom or fluctuates or varies according to the volume of business done in such commerce. If it does, then such commerce is burdened to that extent and the tax is invalid. If on the other hand it does neither of those things, but is a tax on real or personal property including rights, franchises and permissions to do business or use streets or highways granted by the state, it is a tax on property only and valid. It could never have been intended that one engaged in interstate commerce

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should be relieved of contributing his due share of the public expenses according to the property owned by him by reason of the fact that he used his property in carrying on such commerce.

A tax on gross receipts which include those derived from interstate commerce is invalid as it directly burdens the benefits to be derived from such commerce (*Philadelphia Southern S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, Harrisburg, & S. A. Ry. Co.* v. *Texas,* 210 id. 217; *Oklahoma* v. *Wells, Fargo & Co.,* 223 id. 298; *Ratterman* v. *Western Union Tel. Co.,* 127 id. 411), but where the receipts are not in themselves taxed, but are used only to measure a tax within the legitimate power of the state, the tax is not invalid although the receipts come in part from interstate commerce. *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Kansas City F. S. & M. Ry. Co.* v. *Kansas,* 240 id. 228. In *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, the court says: "It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *Provident Institution* v. *Massachusetts,* 6 Wall. 611; *Hamilton Co.* v. *Massachusetts,* id. 632; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 162–165; *U. S. Express Co.* v. *Minnesota,* 223 id. 335, 344."

In *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530, and *Massachusetts* v. *Western Union Tel. Co.,* 141 id. 40, it was held that where the tax was in effect a tax upon the corporation on account of the property owned and used by it within the state it was

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valid and that the fact that the value of its entire capital stock and the proportion of the length of its lines within the state to its entire lines were used as a basis for determining the value of that property did not make it valid under the commerce clause of the Constitution. See, also, *Western Union Tel. Co.* v. *Gottlieb,* 190 U. S. 412. The difference in its effect between a tax on property and operations is pointed out in *Railroad Company* v. *Peniston,* 18 Wall, 5, 36.

The question, therefore, resolves itself into whether the tax on the special franchise in question is a tax on property or whether in its operation and effect irrespective of the manner of its characterization it is a prohibited exaction.

The Tax Law in this state defines the terms "land," "real estate" and "real property" for the purposes of taxation to include "all telegraph lines, wires, poles and appurtenances; * * * all mains, pipes, and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes." The Tax Law of the state defines a special franchise as follows: "A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, asso-

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ciation or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise." Section 43 provides that the "state board of tax commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town or tax district."

Concededly the entire business of relator is part of foreign commerce; the tax, however, is neither in form nor substance a direct burden on such commerce. It is a tax on property situated within this state consisting of the tangible property such as wires, cables, etc., laid in and along the streets and waters of the city in connection with the franchise or right to maintain and operate the same in and over said streets and waters.

It is as clearly a tax on property within this state as would be a tax on the office building of a corporation engaged in interstate or foreign commerce. It is designated in the statute as a tax on property and there is nothing in its operation to show such designation is wrong. It neither directly reaches transactions in foreign commerce nor the profits thereof or the privilege of engaging therein. Even if the net earning method of determining the value of the franchise were applicable in this case, which it is not, as hereinafter pointed out, such earnings are only used as a measure of the value. They are not the subject of tax and the distinction between the subject and measure of the tax is well settled. See cases above cited. In *Home Ins. Co.* v. *New York*, 134 U. S. 594, a tax on franchise measured by the dividends declared on the capital stock was held valid although invested in United States Bonds.

As to the question of over-valuation. The valuation

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of the special franchise is $407,000, made up of $128,439 tangible property, and intangible property $278,561. No question is made as to the tangible property. The relator claims over-valuation of the intangible property and the burden is on it to show it. *People ex rel. N. Y. C. & H. R. R. R. Co.* v. *Priest,* 206 N. Y. 274.

The rule is well settled that in cases of assessment for purposes of taxation it is to be assumed that the valuation by the state board is correct and the burden of proof rests upon the relator who attacks the assessment to show that the result arrived at by the board is incorrect. *People ex rel. N. Y. C. & H. R. R. R. Co.* v. *Priest,* 206 N. Y. 274.

The net earning method of determining the value of the intangible property is applicable where the earnings of the property to be assessed can be determined with reasonable certainty, but where the special franchise is part of a larger earning unit, manifestly the net earnings of the whole form no proper basis for determining the earnings of the part where, as here, the special franchise to be assessed represents the terminal property in a populous city of a large system extending far beyond the city's limits. Where the mileage of the telegraph lines, within the city, is small as compared with the total mileage, but the terminal property in the city is the means of reaching the central point from which business emanates and to which it converges, a comparison of the mileage of the special franchise with the total mileage cannot in the nature of things be an accurate basis for determining what proportion of the total net earnings should be allocated to the terminal property. In *People ex rel. N. Y. C. & H. R. R. R. Co.* v. *Priest,* 206 N. Y. 274, in a case very similar to this, the court says: "Any comparison of track or passenger mileage necessarily spreads the earnings over the mileage, without taking

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into account the value of a franchise at a particular place to increase the earnings of the system of road with which it is connected. A particular franchise is frequently of important value in connection with a railroad system as a means of obtaining and retaining business."

The above is peculiarly applicable in this case where relator's telegraph or cable lines extend under the ocean to foreign countries while the mileage of the special franchise here involved is comparatively small but serves to connect the New York office of relator with the ocean cables and really supplies these cables with all messages transmitted over them. It seems obvious that a division of earnings on a mileage basis as between the two would be simply fanciful. Such a division bears no such relation to the value of the special franchise as to constitute any evidence whatsoever. Every element of "*proof*" is lacking.

Relator having failed to sustain the burden of proving that the assessment is in excess of the real value, the writ must be dismissed.

Writ dismissed.

AMANDA TILLMAN et al., Plaintiffs, *v.* CHARLES A. OGREN et al., Defendants.

(Supreme Court, New York Special Term, April, 1917.)

Wills — construction of — residuary estate — meaning of "his heirs and assigns forever" — mortgages — evidence — actions.

Where by a wife's will her residuary estate was given to her husband, his heirs and assigns forever, with the understanding that he should give and turn over to her sister such part as remained undisposed of at his death, and in addition to a sum of money received from his wife's estate he came into possession,

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from the same source, of a parcel of real property which he mortgaged, and he dies leaving a will by which all of his estate was given to his sister and sister-in-law, the latter is entitled to recover such part of her sister's residuary estate as was not disposed of by her husband in his lifetime.

While the words "his heirs and assigns forever" may be considered in determining the proper construction of the devise or bequest to the husband, their inclusion added nothing to the quality of the interest or estate which he would have taken without them.

The money borrowed on the mortgage being identified and shown to have been intact in the savings bank at the husband's death, where it had been originally deposited, should be paid to the wife's sister upon the production by her of a certificate of a satisfaction of the mortgage.

The evidence failing to identify the other moneys sought to be recovered, the action as to them must fail as it was at least necessary to show that that part of the property in the husband's possession at his death was clearly traceable to his wife's estate.

ACTION to recover property received from a wife's estate, and in the husband's possession at his death.

Mitchell & Mitchell, for plaintiffs.

L. W. Severy, for defendants.

PLATZEK, J. By the will of Anna C. Erickson all her residuary estate, real and personal, was given to Lars Erickson, her husband, "to have and to hold the same to him, his heirs and assigns forever, *with the understanding that at the decease of the said Lars Erickson all of the estate which he shall derive under this will, which shall then remain by him undisposed of, he shall give and turn over to my sister, Amanda Tillman.*" Both the husband and the sister survived the testatrix. Under the decree upon the accounting

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the husband received $3,155.19 from his wife's estate. He also came into possession of a parcel of real property which he subsequently mortgaged for $1,500. Later the husband died, leaving a will by which he left all his property to his sister and sister-in-law. The plaintiff, the sister of the testatrix, Anna C. Erickson, and named in her will, brings this action to recover the moneys received by Lars Erickson from his wife's estate and the moneys borrowed by him upon the mortgage of the real property on the theory that these moneys were all derived from his wife's estate and that none of them were disposed of by him within the meaning of her will. I find no difficulty in holding that plaintiff is entitled to such part of her sister's residuary estate as was not disposed of by Lars Erickson in his lifetime. The residuary gift is plainly made upon that condition or with that limitation. The words used were not merely precatory. They were more than expressions of desire, hope or expectation. They expressed the condition or, as testatrix put it, the "understanding" upon which the gift was made. "The word 'understand,' so much used by lawyers and jurists in connection with the execution of deeds, wills and such instruments, includes the realization of the practical effects and consequences in every direction of the proposed act, be it deed or will." Pitney, V. C., in *White* v. *White,* 60 N. J. Eq. 104–115. This limitation upon the gift was no less plain than the words of gift themselves (*Smith* v. *Bell,* 6 Pet. 68, 76), and the testatrix's intention must be given effect if it can be done without the violation of settled principles. *Colt* v. *Heard,* 10 Hun, 189. The addition of the words "to him, his heirs and assigns forever" added nothing to the quality of the interest or estate which the husband would have taken without them. These words are entitled to be considered in determining the

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proper construction of the devise or bequest (*Clay* v. *Wood,* 153 N. Y. 134), but their inclusion cannot override the evident intention manifested by the words which follow them. *Trunkey* v. *Van Sant,* 176 N. Y. 535, 542, 543. I conclude that the husband, taking under the will, was bound by the "understanding" expressed in the giving clause, and that, if he would otherwise have had a general power to dispose of the property by his will (*Matter of Gardner,* 140 N. Y. 122), the concluding words of the clause show that he was not intended to have power so to dispose of it except in plaintiff's favor. The testatrix appears to have anticipated that her husband would have some portion of the estate left when he died, and evidently wished to make sure that in that event it should go to her own sister rather than to her husband's family or relatives. The $1,500 borrowed on mortgage was identified and shown to have been intact at the husband's death in the savings bank where it had been originally deposited. It should be paid to plaintiff upon her producing a certificate of the satisfaction of the mortgage. The evidence fails to identify the other moneys sought to be recovered. The burden was upon the plaintiff to establish that the property received by the husband from his wife's estate, and for which a recovery is sought, was still in the husband's possession at the time of his death. *Seaward* v. *Davis,* 198 N. Y. 415. Of course I do not mean to say that the identical moneys or deposits must necessarily have remained unchanged. But it was at least necessary to show that that part of the property in the husband's possession at his death, which is sought to be recovered by plaintiff, was clearly traceable to the wife's estate. The bank accounts do not satisfactorily aid in such an identification, but rather indicate the contrary. It would be mere speculation to say that the moneys

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received by the husband under the surrogate's decree probably remained undisposed of by him and were still in his possession when he died. As to these moneys, therefore, the action must fail.

Ordered accordingly.

THEODORE HEITKAMPER, Plaintiff, *v.* MORITZ HOFFMANN, Individually and as Treasurer of Journeymans Bakers Union et al., Defendants.

(Supreme Court, Kings Special Term for Trials, April, 1917.)

Injunctions — when employer may refuse to employ union labor — associations — labor unions — judgments.

Associations — when unincorporated has no standing as legal entity — actions — judgments — Code Civ. Pro. § 1919.

An employer may refuse to employ union labor and stand upon his right to employ any one he chooses without assigning any reason therefor.

A bakers' union upon the refusal of plaintiff to unionize his bake shop is within its legal rights in publishing and distributing a circular calling attention to the fact that plaintiff conducted a non-union shop, soliciting its sympathizers and friends to withdraw their patronage or to refrain from patronizing plaintiff.

Where as a result of the various acts complained of plaintiff's business has been injured, his receipts have materially fallen off and he has suffered many annoyances and inconvenience, and a continuance of these acts will result in his financial disaster, he will be granted a judgment against the individual defendants, the defendant union, its officers, agents and employees, restraining them and each of them from congregating in front of plaintiff's shop, from marching up and down upon the sidewalk in front of the shop, from blockading the entrance thereto and from in any way or manner preventing intending customers from entering or departing from plaintiff's shop or in any manner by threats, violence, intimidation or force interfering with plaintiff's employees or those who may seek employment from plaintiff.

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While an unincorporated association has no standing as a legal entity, section 1919 of the Code of Civil Procedure provides a convenient method by which such an association can sue or be sued, and each member, the agents and employees of the association are bound by the judgment rendered in an action against it.

ACTION for an injunction.

Weismann & Hertz (Henry Weismann, of counsel), for plaintiff.

Kramer, Cohn & Meyer (Max Meyer, of counsel), for defendants.

CALLAGHAN, J. The plaintiff conducts a bake shop at the corner of Grove street and Knickerbocker avenue in the borough of Brooklyn. It is known as an open shop, inasmuch as the plaintiff does not employ bakers who are members of the union.

Representatives of the Journeymans Bakers Union, one of the defendants here, called upon plaintiff on two occasions and urged him to unionize his shop. He refused. Upon such refusal one of the representatives of the union stated to plaintiff that "where there is a will there is a way." Thereupon the union set upon a plan to force the plaintiff to comply with its demands, namely, to unionize his shop. No complaint was made as to the sanitary condition of the shop and it appears that those employed by the plaintiff were receiving the same pay as members of the union. Various methods were adopted to bring about the desired result. A circular was distributed throughout the neighborhood calling attention to the fact that the plaintiff conducted a non-union shop and requesting those in the neighborhood not to patronize plaintiff and advising them where bread baked in union shops and bearing the union label could be purchased.

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Members of the union accosted plaintiff's employees on the street and attempted to persuade them to leave plaintiff's employment, and on one occasion, at least, a personal altercation ensued which resulted in the arrest and conviction before a magistrate of one of the members of the union charged with disorderly conduct. But a more forceful method was adopted for the evident purpose of convincing plaintiff that his interests would best be served by unionizing his shop. The plan adopted was somewhat crude but effective to the extent of causing a loss of trade and of profits to the plaintiff. Pursuant to a direction by the union, various members were notified from time to time by the chairman of the local executive board to be present at the corner of Grove street and Knickerbocker avenue at a time specified "to conduct a label agitation." The designated place was not a regular meeting place of the union or of any committee and the "label agitation" was directed at no other than the plaintiff. The notices of this meeting were sent through the mails on a postal card and each "comrade" was advised not to "bring the postal card with you." Failure to attend would subject the comrade to a fine of twenty-five cents, presumably by the union.

From time to time various members of the union, or persons engaged by them, met on the corner of Grove street and Knickerbocker avenue, in front of plaintiff's bake shop. These meetings continued three times a week for some months. The members of the union or its employees would march up and down on the street in front of plaintiff's store. The marchers consisted of from six to ten men. They wore placards on various occasions, advising the public to purchase only bread bearing the union label; and from time to time advised people on the street not to purchase bread from Heitkamper but to go across the street and pur-

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chase it from another baker who conducted a union shop. Frequently the marchers blocked the entrance to plaintiff's store; spit upon the sidewalk and "made faces" at those employed in the store, and on one occasion a policeman, on post regularly assigned to duty, arrested a number of the marchers. They were charged with disorderly conduct but discharged by the magistrate. After their discharge each of these persons brought an action in the Supreme Court against the plaintiff for malicious prosecution, being in each case represented by the counsel for the union.

The union in some instances paid fifty cents per day to each of the marchers for their expenses.

As a result of the various acts here complained of, the plaintiff's business has been injured, his receipts have materially fallen off, and he has suffered many annoyances and much inconvenience. A continuance of these acts will, no doubt, result in financial disaster to the plaintiff, and he asks injunctive relief as the only means of adequate protection.

It is evident that a prosecution for a crime is an inadequate deterrent for those who have set on a plan to ruin plaintiff financially, as it is exceedingly doubtful if a conviction could be obtained. It might be, however, that a criminal conspiracy could be proven against the members of the union and a prosecution had therefor, but no single act complained of is sufficient in itself to warrant a conviction. The facts here present a question peculiarly for equitable relief, because it is the combination of various acts, innocent in themselves, which, taken together, result in a serious loss to this plaintiff and in a serious impairment of his rights. It is not so much the acts which were done that constitute the offense here as the manner in which they were done. As was very aptly said by Mr. Justice Jenks, in *Mills* v. *United States Printing Co.*, 99 App.

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Div. 605: "But 'picketing' may also mean the stationing of a man or men to coerce or threaten, or to intimidate or to halt or to turn aside against their will those who would go to and from the picketed place to do business, or to work, or to seek work therein, or in some other way to hamper, hinder or harass the free dispatch of business by the employer. In such a case picketing may well be said to be unlawful."

The facts in this case satisfactorily establish a conspiracy on the part of the members of the union, stimulated by its officers, to ruin the plaintiff financially, unless he submits to the demands of the union. The union's plan was to force the plaintiff by fair means, if possible, but by any means, if necessary, to recognize the union. The union had a perfect right to exercise all the legitimate means which it could command to induce the plaintiff to unionize his shop, and he had a right to resist such demands and to refuse to comply with them if he desired to conduct an open shop. Did the union go beyond the bounds prescribing their course of action? Did they exercise any force other than legitimate persuasion to induce the plaintiff to unionize his shop? If the course adopted by the union was an infringement upon plaintiff's rights then its acts should be restrained.

The respective rights of the parties to this controversy may be tersely stated as follows:

The plaintiff was justified in refusing to employ union labor and in standing upon his right to employ any one he chose without assigning any reason therefor.

The defendants were justified in reasoning with plaintiff's employees in an effort to persuade them to leave plaintiff's employ, and in striving to win the sympathy of the public in order that the latter might withhold its patronage from the plaintiff, provided,

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however, that no force, fraud, intimidation, coercion or unlawful means were used to accomplish these purposes. *National Protective Association* v. *Cumming*, 170 N. Y. 315.

When the plaintiff was told by a representative of the union that " where there is a will there is a way " no deduction can be made from this statement other than that an attempt would be made by the union to ruin the plaintiff financially unless he submitted to its demands. There is nothing particularly wrong in a number of men marching on the sidewalk, but a continuance of that act, three times a week for a number of months, the interviewing upon the sidewalk of intending customers of plaintiff, the advising of them not to purchase bread from the plaintiff, and the gathering of a large number of men in front of the plaintiff's store, cannot be regarded as anything but an infringement upon the plaintiff's rights.

The union was within its legal rights in publishing and distributing the circular, soliciting its sympathizers and friends to withdraw their patronage or to refrain from patronizing the plaintiff. *Sinsheimer* v. *United Garment Workers*, 77 Hun, 215; *Foster* v. *Retail Clerks' Association*, 39 Misc. Rep. 48.

The defendant union has been sued by naming its treasurer and alleging that it is an unincorporated association consisting of seven or more members. It is composed of three or four hundred members, which are being constantly changed by death, resignation, withdrawals and new members. It was not formed for pecuniary purposes. Counsel urges therefore that the union cannot thus be sued in an action — that it is necessary to make each member a party defendant. Section 1919 of the Code of Civil Procedure does not limit an action against the president or treasurer to one where money damages is claimed. An unincorporated associa-

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tion has no standing as a legal entity but the statute provides a convenient method by which such an association can sue or be sued. And each member, the agents and employees of the association are bound by the judgment rendered in such an action. *Bossert* v. *Dhuy,* 166 App. Div. 251; *Russell & Sons* v. *Stampers & Gold Leaf Local Union,* 57 Misc. Rep. 96; *Stearns* v. *Marr,* 181 N. Y. 463. The rule laid down in *McCabe* v. *Goodfellow,* 133 N. Y. 89, is not at variance with this view.

No just complaint can be made by the plaintiff against the union's circularizing the neighborhood, asking the friends of union labor not to patronize this plaintiff, nor can the plaintiff seek to restrain the union, its members or agents from peaceably persuading proposed patrons of the plaintiff from trading in his shop. The doing of those things will not be restrained. But a judgment will be entered here restraining the individual defendants named here and the defendant union, its officers, members, agents and employees from congregating in front of plaintiff's shop, from marching up and down upon the sidewalk in front of his shop, from blockading the entrance to his store and from in any way or manner preventing intending customers from entering or departing from plaintiff's shop, or in any manner by threats, violence, intimidation or force, interfering with plaintiff's employees or those who may seek employment from plaintiff.

Judgment accordingly.

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MICHELE ALFONSO, Plaintiff, v. MARIA GABRIELLE ALFONSO, Defendant.

(Supreme Court, Kings Special Term, April, 1917.)

Process — service of, must be in the English language — publication — actions — divorce — when application for judgment denied — Code Civ. Pro. § 22.

Under section 22 of the Code of Civil Procedure all process, records, pleadings and proceedings in our courts "must be in the English language," and service of the summons by publication, in an action for divorce, in a newspaper printed entirely in the Italian language, is ineffectual though both parties to the action are Italians; and where the action is uncontested plaintiff's application for judgment must be denied and the complaint dismissed.

APPLICATION for judgment in an uncontested action for divorce.

True P. Pierce, for plaintiff.

No appearance for defendant.

KAPPER, J. In this, an uncontested action for divorce, service of the summons was attempted to be made upon the defendant by publication. The order of publication named two newspapers, one of which is published in the Italian language. The proof of publication before the court shows the summons and notice to have been printed entirely in Italian. The court intimated on the taking of proofs affecting the merits of the plaintiff's charges that the publication in question was insufficient. Counsel for plaintiff insists that, as the parties are Italians, such publication "most likely" gave notice to the defendant, as

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section 440 of the Code of Civil Procedure expresses it. But this requires the impermissible assumption that the defendant, if she is at all able to read, does so in Italian, and furthermore requires the acceptance of proof through an interpreter that the summons was correctly printed which would be allowable only if a summons may be published in a foreign language. The question of the publication of a summons in a foreign language does not seem to have been presented for decision, either in this or any other state, so far as my research goes, and so far as counsel have been enabled to aid the court, but I think it must be decided that such a publication is ineffectual. All process, records, pleadings and proceedings in our courts "must be in the English language." Code Civ. Pro. § 22. The form of the summons is expressed in section 418 of the Code, and the language of the notice to accompany the summons when published is stated in section 442. In such an action as this, final judgment cannot be rendered upon defendant's default in appearance unless the published summons is accompanied by the words "Action for a divorce." Code Civ. Pro. § 1774. In none of these statutory requirements is there any indication that there can be any substitute for the English language of the statutes and which section 22, *supra,* expressly requires to be adopted.

As well might it be claimed that *personal* service of a summons written in a foreign language is good service, for due publication is due service, and the error in the one case is equally obvious in the other.

It may be that the justice in making the order of publication had the discretion to designate this foreign language newspaper as one "most likely to give notice to the defendant," but the publication should have been in English. This was the ruling in a Wisconsin case (*Wakeley* v. *Nicholas,* 16 Wis. 588), where publica-

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tion of a summons in English in a German newspaper was held good.

The application for judgment must be denied, and the complaint dismissed.

Application denied.

SOCIETY FOR THE PREVENTION OF MUNICIPAL WASTE AND THE PROTECTION OF PROPERTY RIGHTS IN NEW YORK CITY, Plaintiff, *v.* JOHN PURROY MITCHELL, and Others, as Members of and Constituting the Board of Estimate and Apportionment of the City of New York, Defendants.

(Supreme Court, Kings Special Term, April, 1917.)

Constitutional law — injunctions — taxpayer's action — city of New York — statutes — when complaint dismissed on merits — Laws of 1911, chap. 777.

In a taxpayer's action to enjoin the board of estimate and apportionment of the city of New York from taking any action to carry into effect a certain contract with the New York Central Railroad Company in pursuance of chapter 777 of the Laws of 1911, which was enacted with the object and purpose of ameliorating the condition of grade crossing evils on the west side of the city, *held*, that said statute is constitutional and that its provisions, which are not mandatory, are still in force.

That there is no merit in plaintiff's suit and there never was any justification for said action either in law or in morals, and defendants' motion for judgment for the dismissal of the complaint on the merits will be granted.

ACTION for an injunction.

William M. Bennett, for plaintiff.

Charles E. Hughes (Lamar Hardy, corporation counsel, with him on the brief), for defendants.

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MANNING, J. This case is one that is most important, both from the nature of the controversy itself and the character and standing of the parties concerned.

The plaintiff is a corporation organized and existing under the laws of the state of New York, and claims that it is a taxpayer of the city, assessed to an amount of $1,000.

What its corporate objects and purposes are the court has no definite knowledge, beyond what may be inferred from its title, which is the Society for the Prevention of Municipal Waste and the Protection of Property Rights in the City of New York.

The defendants named in the complaint are the mayor of the greater city, the comptroller, the president of the board of aldermen and the presidents of the various boroughs of the city at large — all of whom constitute the board of estimate and apportionment of the city, and the New York Central Railroad Company.

The purpose of the action, briefly expressed, is to prevent by injunction any action on the part of the defendants looking toward the carrying into effect a certain agreement or contract contemplated to be made by the city on one hand and the railroad company on the other.

This agreement and the various steps taken by the parties thereto were in pursuance of a certain act of the legislature of the state of New York, known as chapter 777 of the Laws of 1911, which act or statute is commonly known as an enabling act.

The so-called Enabling Act of 1911 was passed by the legislature of the state of New York with the object and purpose of ameliorating the conditions of grade crossing evils on the west side of New York, which conditions had been the cause of serious loss of life, and also had been responsible for many years of bitter

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strife and legal proceedings between the city and the railroad company. Public feeling had continuously been agitated and aroused and the situation became so acute that it almost assumed the phase of a public scandal.

The railroad was firmly intrenched in its lands and in the enjoyment of its franchise rights, and all efforts on the part of the city to dislodge the road were unsuccessful, as the road established its title in the highest court of the state.

It was the object, therefore, of the act of 1911 to end the struggle, and a most elaborate and comprehensive plan or scheme was devised whereby the whole subject of the differences regarding the matters in dispute were planned to be adjusted upon what appears to be a just, fair and equitable basis.

Both parties proceeded to carry out the spirit and letter of the statute, and during the period of time elapsing between 1911 and 1913, and down as far as 1916, a tentative plan or agreement was prepared, and many hearings and negotiations were had looking toward the consummation of the much desired project.

Many public hearings were had, and at no time was there any attempt made to conceal from the citizens the true situation concerning the most vital and stupendous public measure.

Just when the negotiations were about to be completed by the signing of an agreement, pursuant to the enabling act in question, the whole undertaking was brought to a standstill by the commencement of this litigation and the service of a temporary restraining order.

Nothing further has been done and now comes on the trial of the action upon the merits.

The plaintiff's contention, as I gather it from the complaint, is that the property and funds of the city

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are threatened with waste if the proposed agreement is carried out.

The charge is further made that the carrying out of the agreement is a violation by the mayor and other city officials of their duty toward the citizens and taxpayers.

The further charge is made that such contemplated acts on the part of the city officers are in violation of the charter of the city of New York, the Constitution and of the common law, and constitute an act fraudulent, corrupt and in bad faith.

These charges defendants deny.

It is but just and fair to each and every one of the city officials to say that in my opinion their denials are fully justified by the evidence disclosed upon this trial.

There is no merit in the plaintiff's suit, and, what is more, there never was any justification for its action in law or in morals.

During the course of the trial there was not offered or produced even the slightest scintilla of evidence which could by any stretch of the imagination be construed as establishing fraud, bad faith or corruption against any one of the city officials whose names were dragged into these proceedings.

The case is absolutely barren of any fact or circumstance tending to connect these officials with any violation of law or of their sworn duty, but, on the contrary, the proof is abundant that during all these negotiations they at all times faithfully performed their duty and in every way safeguarded the interests of the municipality.

Now as to the law: I am convinced that the so-called Enabling Act of 1911 is constitutional, and that it is not subject to the objection and infirmities suggested by the plaintiff. I am also of the opinion that its provisions are still in force and effect and that it has not

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been repealed by any subsequent legislative acts to which reference has been made.

I do not consider that the provisions of section 3 are mandatory, but rather that this section, together with all other parts of the act in question, should be read as part of the whole, so that a proper and sensible construction may be given to the statute. Any different construction would be entirely too technical and narrow, and would only tend to nullify the plain intent of the legislative enactment.

There is no force in the argument advanced that there has been any material departure from the word or spirit of the act in the method of doing certain parts of the work or the preparation of the plans.

As I read the statute it contemplates just the contingency that has arisen, and those in charge of this momentous and important public work were given the discretion and latitude which the nature and apparent engineering difficulties of the situation require.

The plaintiff has utterly failed to prove its case or any case either against the city, the officials thereof or the railroad, and, considering the whole evidence as developed on the trial, I grant the motion of the defendants and order judgment of dismissal upon the merits.

Any injunction that may have been granted I will vacate.

Ordered accordingly.

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SEXLAUSE & LEMKE, Plaintiff *v.* LUKE A. BURKE & SONS CO., GLOBE INDEMNITY COMPANY, THE CITY OF NEW YORK, DAVID A. BOODY, H. ROSS APPLETON, DANIEL W. MCWILLIAMS and JOHN W. IMVOY, Constituting a Board or Committee Having Charge of the Erection of Carnegie Library Buildings in the Borough of Brooklyn, Defendants.

(Supreme Court, Kings Special Term, April, 1917.)

Lien Law, § 2 — when valid mechanic's lien created — city of New York — Laws of 1901, chap. 580.

Under section 2 of the Lien Law, a valid mechanic's lien may be created and enforced against a "Carnegie Free Public Library" established in the city of New York under the authority of chapter 580 of the Laws of 1901.

ACTION to foreclose mechanic's lien.

Jacob H. Bantim, for plaintiff.

Charles DeHart Brower, for Globe Indemnity Company.

MANNING, J. This case is submitted on an agreed statement of facts and the cardinal question to be determined is whether a valid mechanic's lien can be created and enforced against what is known as a Carnegie Free Public Library.

Chapter 580 of the Laws of 1901 is the legislative authority for the establishment throughout the city of New York of what is known as the Carnegie Libraries. The act in question, which is entitled "An act to authorize and empower the city of New York to establish and maintain a free public library system," indicates a willingness and desire both on the part of the donor, Mr. Carnegie, and the city to unite in a common pur-

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pose; to wit, that of establishing and maintaining free public libraries for the benefit of the people.

Mr. Carnegie was to furnish, and did furnish, the money with which the buildings were to be erected and equipped, and the municipality was to furnish the lands and provide for the maintenance and upkeep of the structures. The terms of the gift to the city provided that the entire property, including building, books, and the other contents, was to be property of the city. In the prosecution of every step necessary and incident to the promotion of the beneficial enterprise, a library committee, acting for Mr. Carnegie, and the city officials, on behalf of the people, worked in effective co-operation.

The city even employed the architect and paid his expenses, and in many of the meetings and negotiations concerning the project and the progress of the work the city's representatives attended and participated in such conferences. When the stipulated facts in this case are taken into consideration, together with the law under which these libraries were to be constructed and maintained, the conclusion is inevitable that the city intended to secure, and did so secure, through the generosity of Mr. Carnegie, a great public measure, benefit and improvement for its citizens of which the municipality became the owner, and this improvement clearly falls within the purview of section 2 of the Lien Law.

Prior to the passage of chapter 315 of the Laws of 1878 a lien could not be enforced against the real property of a municipality (*Leonard* v. *City of Brooklyn*, 71 N. Y. 498); but this condition no longer prevails for the statute above referred to expressly provides for the enforcing of mechanics' liens against works of a public character and undoubtedly the statute was passed to relieve an unjust situation as it existed when

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the decision in *Leonard* v. *City of Brooklyn* was rendered.

The title of the act clearly shows that was the object of the statute: "An act to secure the payment of laborers, mechanics, merchants, traders, and persons furnishing materials toward the performing of any public work in the cities of the state of New York;" and by section 25 of the Lien Law its provisions are to be liberally construed "to secure the beneficial interests and purposes thereof." Applying this canon of construction to the law and the facts in the case under consideration, I am inclined to hold that the plaintiff secured a valid lien under section 5 of the Lien Law, and also to hold that the validity of his claim and lien is not affected by the question as to whether the city secured the money to build the library by gift or taxation, or in what way the money was to be expended.

The public improvement is undoubtedly there with the knowledge and approval of the municipality, and there is no good reason in law or in equity why those who contributed to placing such an improvement in a condition where it can be used by the public should not be paid for their labor and materials, if the money is available, or if the claimant can under the law file a valid lien for what is his due.

The reasoning of the Court of Appeals in the case of *Bell* v. *City of New York*, 105 N. Y. 139, 144, is pertinent to the situation here and can be read with interest.

Judgment for the plaintiff for the amount claimed in the complaint, and costs, against the contractor and the bonding company.

Judgment accordingly.

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THE CENTRAL RAILROAD OF NEW JERSEY, Plaintiff, *v.* HARRY V. BERRY, Defendant.

(Supreme Court, Greene Trial Term, January, 1917.*)

Carriers—of merchandise—bills of lading — actions — lien — judgments.

Where a common carrier accepts goods only for transportation over its own line, each successive carrier becomes the agent of the shipper and invested with the right to claim from him compensation for services rendered.

A carrier which only agreed to transport a car-load of goods over its own line, which was entirely in the state of New York, handed to the agent of the shipper a receipt and took from the shipper a bill of lading which provided *inter alia* that the owner or consignee should pay the freight and all other lawful charges. The consignee upon being notified of the arrival of the goods, at destination in Jersey City, refused to receive them and the shipper upon being notified of such refusal gave the matter no further attention, whereupon plaintiff, the last carrier, stored the goods, and six months later, in a proceeding under a statute of New Jersey, the goods were sold. In an action against the shipper to recover the amount of charges for freight, car service, unloading and storage, less the amount for which the goods were sold, *held*, that though it appeared that defendant, who did not pay the freight in advance, was not at the time of the delivery to the initial carrier the owner of the goods, the title thereto having passed before the signing of the bill of lading, which went into the hands of the shipper's successive agents, it was proper for plaintiff, the last of them, each connecting carrier having a lien upon the goods for unpaid freight, to pay the back charges for transportation to its line and recover the amount together with its own charges from the shipper.

There being apparent lack of proportion between the value of the goods which were sold for fourteen dollars and the charge for storage, the cost of transportation should be added to its value in the hands of the plaintiff, and viewed in this light the conduct of plaintiff in storing the goods as required by the statute of New Jersey may not be condemned, and plaintiff is entitled to judgment for the amount demanded in the complaint.

* Received too late for insertion in proper place.—[REPR.

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ACTION to recover amount of charges for freight, car service, unloading and storage.

Amos Van Etten, for plaintiff.

Brinnier & Canfield (William D. Brinnier, of counsel), for defendant.

HASBROUCK, J. On May 22, 1915, at Kaaterskill, N. Y., the defendant, Harry V. Berry, brought to the Ulster and Delaware Railroad Company a carload of sawdust for shipment to the Nomordust Chemical Company of Jersey City. The railroad company handed Berry's agent a shipper's receipt and took from Berry, the shipper, a bill of lading. The carload arrived at West Side avenue, Jersey City, and the consignee was notified thereof. It refused to receive the sawdust. Of its refusal the shipper, Berry, was notified. He, however, paid no attention to the matter. The railroad held the sawdust on its car, stored it and after six months, proceeding under the terms of the New Jersey statute, advertised the same for sale and sold it for fourteen dollars. This action is brought to recover two hundred and eighty-three dollars and thirty-eight cents, the amount of the charges for freight, car service, unloading and storage less the fourteen dollars.

The defendant claims that under the terms of the bill of lading the plaintiff seeks payment from the wrong party.

The bill of lading among other things provides:

"§ 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property."

According to the testimony of the defendant's witness the contract was one "to sell." Section 100 of the Personal Property Law reads: "Unless a different intention appears, the following are the rules for

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ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. * * * "

" Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place * * * the property does not pass until the goods have been delivered to the buyer."

A bill of lading in essential characteristics is a receipt for the thing to be shipped and an agreement to transport, and the agent for the carrier is without authority to sign such contract only when the goods have been received. Hutchinson Carriers, § 122. It is true the allegation of the complaint substantially admitted by the defendant states that it was signed " at the time of delivery." *Hunter* v. *Wetsell,* 84 N. Y. 554. If we understand that to mean when the delivery was made or completed, the title to the goods then passed; if the agreement was " to sell " upon a delivery made to the railroad at Kaaterskill or before that time if the agreement was " of sale " (See Pers. Prop. Law § 100, rule 1), the property in the shipment having passed before the signing of the bill, the defendant was not the owner at the time of delivery.

If ownership at the time of shipment were the test I should have no difficulty in disposing of the demand of the plaintiff for freight and storage charges. The obligation to pay the charges of affreightment, however, under the law, notwithstanding the terms of the bill of lading, is not confined to the owner or consignee.

The basic principle of the transaction is bailment. It is the shipper who is the bailor and he it is who is liable for the compensation to be paid for carriage. *Wooster* v. *Tarr,* 85 Am. Dec. 707; *Blanchard* v. *Page,* 8 Gray (Mass.), 281. But the carriage in the case at bar contemplated successive bailments by the Ulster and Delaware Company, by the West Shore Railroad

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Company and by the plaintiff. The relation of the shipper to these carriers is as stated by Mr. Justice Lurton of the United States Supreme Court: "Independently of the Carmack amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry safely over its own lines only and then deliver to the next carrier, who would then become the agent of the shipper." *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 196. The Ulster and Delaware only agreed to "transport over its own line." Conditions Bill of Lading, § 2. Thus the plaintiff became the agent of the shipper and invested with the right to claim from the shipper compensation for services rendered him. But the shipper did not pay the freight in advance and his goods and bill of lading went into the hands of his successive agents, and it was proper for the last of them, each connecting carrier having a lien upon goods for unpaid freight, to pay the back charges for transportation to its line and recover the amount together with its own charges from the shipper. Moore Carriers, § 25, p. 494.

There remains only the apparent lack of proportion between the value of the sawdust and the charge for storage. The cost of transportation should be added to its value in the hands of the plaintiff. Viewed in this light the conduct of the plaintiff in storing the goods for six months as required by the New Jersey statute may not be condemned. *Brooklyn Eastern D. Terminal* v. *Central R. of New Jersey,* 176 App. Div. 352.

Judgment for plaintiff for amount demanded in the complaint.

Judgment accordingly.

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LOUISE HAMBURGER, Plaintiff, v. CORNELL UNIVERSITY, Defendant.

(Supreme Court, Saratoga Special Term, April, 1917.)

Negligence — action to recover for personal injuries — waiver — pleading.

In an action brought against Cornell University by a duly enrolled student in its Agricultural College, to recover for personal injuries sustained in consequence of the explosion of a mixture of chemicals in a glass tube, while she was performing a certain experiment in chemistry under the verbal instructions of one of the instructors, defendant should be protected or held liable by the same rules of law as are charitable institutions, and the waiver of any liability of the defendant for negligence, implied from the relation between it and plaintiff, precludes a recovery.

The complaint herein considered, and demurrer thereto, on the ground that it fails to state a cause of action, sustained.

DEMURRER to complaint.

Nash Rockwood (H. P. Pendrick, of counsel), for plaintiff.

Mynderse Van Cleef (O. L. McCaskill, of counsel), for defendant.

VAN KIRK, J. This is a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The complaint attempts to state a cause of action in negligence as follows: The defendant is a domestic corporation; in October, 1915, the plaintiff went to Cornell University, paid the matriculation fee of five dollars and the infirmary fee of three dollars, entering a course in the home economics department, which included a course or branch

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called Chemistry One; she paid a laboratory fee of fifteen dollars and became a student in the university, taking the course Chemistry One; all the required chemicals and apparatus were furnished by the university and the professors and instructors were employed by the university; as a student she was entitled to the benefits and privileges of the university; in the afternoon of January 12, 1916, pursuing her work in Chemistry One, she was required to perform an experiment known as experiment 88, described in the text book then used, which consisted of combining or mixing two grams of mercuric sulphide with two grams of calcium oxide and heating the mixture in a glass tube, closed at one end; the defendant furnished the chemicals to the students in bottles bearing labels intended to show the contents thereof, from which bottles the students helped themselves to the necessary quantities; plaintiff took two grams from a bottle labeled calcium oxide, or powdered lime, but found no bottle labeled mercuric sulphide; pursuant to instructions she went to the stock room, where the attendant, a boy about fifteen years old, in charge of dispensing chemicals to students, and upon her request, gave the plaintiff two grams of some red chemical powder upon a piece of paper, which plaintiff believed was mercuric sulphide; plaintiff returned to her laboratory desk, mixed the two substances in a mortar, producing a mixture of reddish color; plaintiff, not knowing how to seal one end of the tube, asked Mr. Lake, the instructor, to seal it; Mr. Lake took the glass, sealed one end of it and handed it back to the plaintiff with instructions to put the powder into the tube; plaintiff put the mixture in the sealed tube, the instructor telling plaintiff it was not necessary to use all the mixture, watched her as she put the mixture in, told when she had enough in the tube; plaintiff then, according

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to instructions, subjected the mixture to heat from a gas flame supplied by defendant as part of the laboratory equipment and in accordance with the written directions contained in the text book and upon the bulletin board in the laboratory and the verbal instructions of the instructor, whereupon the mixture exploded with great force, causing the injuries complained of.

The facts alleged are admitted, the conclusions of law are not.

The defendant contends that Cornell University is an eleemosynary institution and is exempt from liability in an action brought by an enrolled student against the university on account of the negligence of one of the instructors.

The court upon demurrer may take judicial cognizance of a public statute, under which certain legal presumptions arise. *Long Island R. R. Co.* v. *City of New York*, 199 N. Y. 303. By the Land Grant Act (Public Laws U. S., 1862, chap. 30, §§ 4, 5) the federal government set aside to each state moneys from the sale of public land, providing that it shall be invested and constitute a perpetual fund, the capital of which shall remain forever undiminished and the interest of which shall remain inviolably appropriated by each state to the endowment and maintenance of a college where the leading objects shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and mechanic arts in such manner as the state legislatures may provide. Any portion of the annual fund or interest lost by any contingency shall be replaced by the state, so that the funds shall remain forever undiminished.

The state of New York accepted the above gift, subject to the trust; and, after transferring the trust to

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the People's College, chartered Cornell University for the express purpose of carrying out this trust. Laws of 1863, chap. 20; Laws of 1865, chap. 585; Laws of 1880, chap. 317; Laws of 1891, chap. 56; Education Law, §§ 1120–1129.

Cornell University is an educational institution, including various departments or colleges, one of which is the Agricultural college. It is supported by the above funds from the United States and by funds from the state of New York and by other endowments and gifts. It is also permitted to receive and does receive certain fees for tuition and other ends, all of which moneys are devoted to the educational purposes of the college.

In Webster's International Dictionary eleemosynary is defined: (1) "Relating or devoted to charity, alms or almsgiving;" (2) "Given in charity or alms; having the nature of alms." Eleemosynary and charitable are in the law interchangeable. 10 Am. & Eng. Ency. of Law, 895. It is a settled rule of law that a charitable institution is not liable for the negligence of its physicians and nurses in the treatment of patients, upon two grounds: *first*, implied waiver. One who accepts the benefit of a charity enters into a relation which exempts one's benefactor from liability for the negligence of his servants in administering the charity. The second ground of the exemption is the relation subsisting between a hospital and the physicians who serve it. It is said that this relation is not one of master and servant, but that the physician occupies the position, so to speak, of an independent contractor. The hospital remains exempt, although the patient makes some payment to help defray the cost of board. *Schloendorff* v. *New York Hospital*, 211 N. Y. 128, 129; *Kellogg* v. *Church Charity Foundation*, 128 App. Div. 214.

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In many jurisdictions it is held that there is a complete exemption in favor of charitable institutions from liability for torts or negligence of their agents or servants, based upon the proposition that the funds of the institution are the subject of a charitable trust and cannot be diverted to another purpose or use; as in Illinois, *Parks* v. *Northwestern University,* 218 Ill. 385; but this doctrine does not prevail in the state of New York. *Hordern* v. *Salvation Army,* 199 N. Y. 233.

A sufficient reason why hospitals are not liable for the negligence of physicians and nurses is that a physician is not an employee or under the orders of the hospital and nurses are under the direction of such physicians.

The implied waiver by a patient extends to, and covers, all negligence on the part of the hospital and its employees in performing hospital duties, and all matters and acts in connection with the hospital and in the furtherance of its objects. In all jurisdictions, " It is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state." *Hordern* v. *Salvation Army,* 199 N. Y. 237. The negligence mentioned in the decisions, the failure to use reasonable care in selecting employees for certain work, comes within this waiver. The reasons for upholding the implied waiver apply not only to the negligence of servants but to negligence in the failure to perform the duties of the master himself, which cannot be delegated. The law implies an intention on the part of the donors of the charitable funds that such funds shall be used for the charitable purpose only and implies an acquiescence in this intention by all persons who accept the benefits of the charity, and therefore the beneficiary waives any responsibility of the institution for negligence. *Kellogg* v. *Church Charity*

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Foundation, 128 App. Div. 218. The objection then, based upon the implied waiver, protects the institution and its funds, and consequently it is a waiver of all claims of negligence, whether by the servants or by the institution itself. The fact that said negligence (in selecting servants) may be invoked and support liability under certain circumstances in actions against defendants conducting an enterprise of gift or kindness and without profit, involves a conclusion that there is a voluntary work in aiding and assisting others which does not come under the implied waiver. The rule has been applied in cases of ship surgeons. *Laubheim* v. *DeKoninglyke* N. S. M., 107 N. Y. 228; *Allan* v. *State S. S. Co.,* 132 id. 91, in which case a statute required the ship owner to provide medicines and a practitioner and where one has volunteered to furnish aid to another. I have read a number of cases suggesting that a charitable institution is not liable to a beneficiary for the negligence of an employee, if it has used reasonable care in selecting him, but no such case in which liability has been upheld on that ground. If it can be, no such negligence is alleged in this complaint.

Many decisions have held that colleges endowed for the advancement of learning are charitable institutions. Cases cited in *People ex rel. New York Inst. for Blind* v. *Fitch,* 154 N. Y. 31–33. But whether or not this is so, I am unable to appreciate any good ground why the reasons given for exempting a strictly charitable institution from liability to a patient for the negligence of its employees does not apply to such a college.

When the hospital is endowed and using voluntary gifts in its maintenance, the fact that it receives fees from some that pay, which fees are devoted to the same uses as its gifts, does not change the character of it

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as a charitable institution or the rules of its liability. *Cunningham* v. *Sheltering Arms,* 135 App. Div. 179. To hold otherwise would subject the endowment and the charitable gifts to depletion and involve a striking inconsistency. The defendant, endowed by federal, state and private gifts and aid, although it charges some fees to its students, bears in all essential respects the same relation to its students that the hospital bears to its patients. The student does not pay for what he gets. The college would be impossible without the gifts; it is organized and run to confer benefits upon the student and through him upon the public. Its benefits are not confined to the indigent, nor are those of the hospital, else payments would not be made by some.

The first reason given for exemption of such hospitals seems to apply in its full force. When a student enters the institution and accepts the benefit of the endowment, he enters into a relation which exempts the benefactor from liability for the negligence of its servants in administering the endowment and gift. The student, who has paid a small tuition or term fee or a special fee for a special course, seems to be in like position with a patient in the hospital who pays for bed and board.

We are not very definitely informed why the explosion occurred, whether because improper ingredients were furnished, or they were mixed in improper proportions or amounts, or the tube was not properly sealed at the end, or improperly handled, or the heat was excessive or allowed to reach directly the mixture. We may assume that, since the experiment was authorized, if properly conducted, no explosion would have followed. The explosion occurred and we are not informed why; one can guess only. An expert chemist alone could make a reasonable guess; and, if he could

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make such guess, it would be only on knowledge of facts which he has, but which the complaint does not disclose. If the proof left a case in such condition, when the evidence was closed, the complaint would have to be dismissed. The plaintiff can prove only those facts fairly alleged. *Paterlini* v. *Memorial Hospital Assn.*, 229 Fed. Repr. 838; *Wright* v. *Delafield*, 25 N. Y. 266, 270.

The attorney for the plaintiff claims in his brief that the defendant was negligent in failing to use reasonable care in the employment of the boy; there is no such allegation in the complaint and no allegations on which such position could be maintained. The attendant at the supply room was a boy of fifteen years; it may be assumed that he was not a skilled chemist, but it does not appear that any one would know, from sight alone, mercuric sulphide; the boy apparently had only the duty of handing out from marked packages the articles called for; there are no allegations of the boy's duties or that defendant was negligent in employing him, or that the boy was negligent or did any wrong act or thing, and the complaint was evidently not framed with intent to charge such negligence. In such a case negligence will not be implied; it must be alleged and proved. Under the allegations of the complaint negligence on the part of the boy could not properly be proven, nor could negligence on the part of the defendant in employing him.

The complaint is in substantially the same condition as to the instructor, except that it is alleged that he supervised, assisted in and watched the experiment. What wrongful act on his part caused the explosion is not disclosed. A careful reading of the complaint fails to inform the court what the negligence complained of is, nor is there anything upon which, if true, the court could say that the instructor was incompetent

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or the defendant negligent in employing him for the duties assigned to him. There is nothing in the complaint indicating an intent to charge negligence in employing the instructor.

For the purposes of this case the same rules should be applied as are applied to charitable or eleemosynary institutions. Colleges endowed as is Cornell, in a negligence action brought by a duly received student, should be protected, or held liable, by the same rules of law as are charitable institutions. The waiver implied from the relation between the student and the endowed college protects the defendant against a recovery. The demurrer is sustained.

Demurrer sustained.

LEVI A. LITZENBERGER, Plaintiff, *v.* BERTHA LITZENBERGER, Defendant.

(Supreme Court, Monroe Special Term, March, 1917.)

Trial — misconduct of — jury — evidence — verdict — parties.

Misconduct not appearing upon the record of the trial such as communications with the jury is grossly improper but it may be disregarded by the court on a motion for a new trial unless it is of such a character as to affect a substantial right of a party to a fair, impartial and public trial of the case according to the evidence.

The exhibition in the jury room of a coat worn by a party immediately after the commission of an alleged act of adultery, and also worn during the trial and while on the witness stand and which was called to the attention of the jury by having her arise to give the jury a view of it, is not such an act as can be said to have affected the verdict and is therefore not prejudicial.

MOTION by defendant for a new trial.

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Daniel Moran, for motion.

W. H. Hurley, opposed.

RODENBECK, J. It is claimed that there was misconduct on the part of the jury in having brought into the jury room a coat which the defendant wore at the time of the commission of the alleged act of adultery. One of the officers of the court at the request of the jury obtained the coat from the defendant and brought it into the jury room. It is claimed that this constitutes misconduct and prejudicial error. Communications with a jury with reference to the case while they are deliberating upon their verdict are grossly improper but do not necessarily constitute legal error. Such misconduct varies from some trivial occurrence which could not affect the result to a gross impropriety which obviously affected a substantial right of a party and between these extremes there are cases which require the exercise of a sound judgment on the part of the court in the determination of their legal effect.

This procedure is regulated neither by statute nor by rules but by the common law and illustrates the futility of attempting to define by an inflexible statute the cases which shall constitute misconduct as is attempted to be done in the Code of Civil Procedure with respect to other matters of practice not of as serious a consequence as the one under consideration. It has been held to be sufficient to vitiate a verdict where without the consent of the parties a justice went into the jury room and answered questions (*Taylor* v. *Betsford*, 13 Johns. 486; *Benson* v. *Clark*, 1 Cow. 258; *Watertown Bank & Loan Co.* v. *Mix*, 51 N. Y. 558); where he sent to the jury written answers to questions put to him by the jury (*Plunkett* v. *Appleton*, 51 How. Pr. 469); where he sent his minutes to the jury room

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(*Neil* v. *Abel*, 24 Wend. 185); where documents not in evidence were delivered to the jury (*Elliott* v. *Luengene*, 17 Misc. Rep. 78); but it has been held not to be prejudicial where an annuity table was sent to the jury room where the age of the injured party was not in evidence (*Schappner* v. *Second Ave. R. R. Co.*, 55 Barb. 497); where exhibits are taken into the jury room without consulting the judge (*Nellis* v. *Countryman*, 63 Misc. Rep. 561, 564; *People* v. *Dolan*, 186 N. Y. 4); where innocent communications were had between one of the attorneys in the case and a juror or conversations took place between the presiding judge and a juror after the verdict (*Rippley* v. *Frazer*, 69 Misc. Rep. 415); where harmless communications between a juror and an adjuster in the employ of the defendant took place (*Werner* v. *Interurban St. R. Co.*, 99 App. Div. 592); and where a view of the scene of the accident was had two years after the accident (*Haight* v. *City of Elmira*, 42 id. 391).

These cases are sufficient to illustrate the rule that misconduct such as communications with the jury should be firmly discouraged and discountenanced but may be disregarded unless it is of such a character as to affect a substantial right of a party to a free, impartial and public trial of the case according to the evidence. Parties are entitled to have their cases tried upon competent and relevant evidence produced in open court where they may have an opportunity of cross-examining and interposing objections. This right is infringed upon where communications are had with the jury not in open court where objections may be raised thereto. But where such communications are had it must appear that they may have affected the result of the trial. It is not necessary to show that they did have that effect. It would be difficult, if not impossible, to show their effect in view of the rule that

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the affidavits of jurors may not be received to impeach their verdict. *Dalrymple* v. *Williams*, 63 N. Y. 361; *Perkins* v. *Brainard Quarry Co.*, 11 Misc. Rep. 326, 336. It is sufficient if they are likely to have affected the result. *Buffalo Structural Steel Co.* v. *Dickinson*, 98 App. Div. 355, 359; *Haight* v. *City of Elmira*, 42 id. 391; *Matter of Vanderbilt*, 127 id. 408, 409. The expressions used in these cases are that it is sufficient cause for reversal if the acts complained of are "likely" to have influenced the verdict and that it is insufficient cause where it is to be "presumed" that such misconduct "did not produce" injury to the moving party and where it can be seen that the misconduct was "inadvertent" and did not result in "harm" to the complaining party. It is a matter resting in the sound discretion of the trial judge under the circumstances of the case whether the alleged misconduct affected a substantial right of a party to such a trial as is guaranteed by the laws of the land.

In this instance it cannot be said that any substantial right has been affected. The coat which was exhibited to the jury was worn by the defendant on the witness stand where she was asked to stand up and exhibit it to the jury which she did. The jury had every opportunity to see all that they observed in the jury room and while the coat was not formally put in evidence it was exhibited to the jury and they had every opportunity to obtain all of the information which they might have obtained from their examination in the jury room.

Under these circumstances and in view of the further conclusion that the evidence of the case presented a fair conflict for the determination of the jury, the motion for a new trial is denied, with costs.

Motion denied, with costs.

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FLORA WALDEN, Plaintiff, v. UNA W. FELLER, Defendant.

(Supreme Court, Allegany Special Term, March, 1917.)

Replevin — when replevin will not lie to recover possession of written instrument — real property — pleading — damages.

Replevin will not lie to recover possession of a written instrument creating in plaintiff a life estate in certain premises, where the execution and the delivery of the instrument are put in issue by defendant's denial, as a finding that the instrument was in fact executed and delivered determines the title to the real estate in question.

The fact that plaintiff because of her inability to recover possession of said paper seeks to recover as damages her expectant expenses to be incurred in prosecuting an equity action to establish her title to a life estate is an admission that the real purpose of the replevin action is to determine her claim to the real estate, and the complaint must be dismissed.

ACTION in replevin.

Lee Fassett, for plaintiff.

Jesse L. Grantier, for defendant.

BROWN, J. The plaintiff seeks the possession of a paper claimed by plaintiff to have been executed and delivered by the defendant, creating in the plaintiff a life estate in certain premises. The defendant denies the execution and delivery of the instrument in question. The existence of the paper is the issue presented. The plaintiff has no legal claim to the life estate in question except by virtue of the paper. Before possession of the paper could be awarded to the plaintiff, a finding must be made that it in fact was executed and delivered; such a finding necessarily determines the

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title to the real estate in question. An adjudication that there was a duly executed and delivered instrument creating a life estate in the plaintiff upon the issues presented by the pleadings and proof would be an adjudication that the plaintiff has the legal title to a life estate in the premises. Such title cannot be determined in a replevin action.

Replevin will not lie for the recovery of real property. It does not lie for the purpose of determining title to real estate. Cobb Replevin, § 56.

Replevin will not lie to recover a deed where the title to land is involved in the action. 34 Cyc. 1358.

Replevin will not lie for the recovery of a deed where there is a question whether it was delivered or not, and the title to the land will be involved in the action; title cannot be tried in this way. Cobb Replevin, § 79.

While it is true that a writ of replevin will lie for the recovery of a deed when the object is to recover possession of the specific paper, and not to test the right to the land which it in terms conveys, the writ will not lie for the unlawful taking or wrongful detention of a title deed where there is a dispute about its delivery, and the controversy involves determination of title to the land described in the deed. The real controversy here is as to the title. The real issue in the case is whether the deed was delivered, and the court should have entered a judgment of nonsuit. *Christenson* v. *Hanna,* 183 Ill. App. 115.

The precise question here presented does not seem to have been decided in this state. The decisions of sister states are in harmony in holding that if the title to real estate must necessarily be determined in order to award possession of title deeds an action in replevin will not lie. *Flannigan* v. *Goggins,* 71 Wis. 28; *Pasterfield* v. *Sawyer,* 132 N. C. 258; *Hooker* v. *Latham,* 118 id. 179; *Simmonsen* v. *Curtis,* 43 Minn. 539; *Walker*

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v. *Daly*, 80 Wis. 222; *Daggett* v. *Daggett*, 143 Mass. 516.

The fact that plaintiff seeks to recover as her damages by reason of her inability to recover possession of the specific paper her expectant expenses to be incurred in prosecuting an equity action to establish her title to a life estate is an admission that the real purpose of this replevin action was to determine her claim to the real estate. The plaintiff's complaint must be dismissed.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. GEORGE F. ZIEGER, Relator, v. GEORGE W. WHITEHEAD, as Mayor; FRANK A. JENSS, ADIN B. CHASE, W. ACHESON SMITH, and WILLIAM GILLETT, as Councilmen, Constituting a Board Known as the "Council of the City of Niagara Falls;" OSSIAN E. CARR, as City Manager of the City of Niagara Falls, N. Y., and FRANK BURLINGAME, as Division Foreman of the Bureau of Public Service of the City of Niagara Falls, N. Y., Respondents.

(Supreme Court, Niagara Special Term, April, 1917.)

Civil Service Law — provisions of section 22 of — who entitled to peremptory writ of mandamus — appointments — municipal service — city of Niagara Falls.

The word "held" in the provision of section 22 of the Civil Service Law that "If the position so held by any such honorably discharged * * * volunteer fireman shall become unnecessary or be abolished * * * the said honorably discharged volunteer fireman holding the same shall not be discharged from the public service, but shall be transferred to any branch of the said service for duty in such position as he may be fitted to fill," etc., includes a probationary as well as a permanent occupancy of the position.

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Where before the expiration of the probationary period for which relator, an honorably discharged volunteer fireman, was appointed to the position of foreman in the street department of the city of Niagara Falls, the position was abolished, resulting in his discharge from the city employment, he is entitled under section 22 of the Civil Service Law to a peremptory writ of mandamus providing for his transfer to some new position for which he is fitted.

Upon again entering upon his duties in said municipal service relator will still be a probational employee entitled as of right to complete the unexpired portion of the probationary period, at the end of which he may be peremptorily discharged.

MOTION for alternative writ of mandamus.

Michael J. Noonan, for relator.

Robert J. Moore, for respondents.

SEARS, J. In February, 1916, the relator instituted a mandamus proceeding to require the city authorities of the city of Niagara Falls, N. Y., to reinstate him in a position in the classified civil service held by him, or to assign him to such branch of the municipal service as he is fitted to fill, in accordance with the provisions of section 22 of the State Civil Service Law. At that time the relator's affidavit showed him to be an honorably discharged volunteer fireman and that about the 15th day of October, 1915, he was appointed to the position of foreman in the street department of the city of Niagara Falls, and that about the 1st day of January, 1916, the position was abolished, resulting in his discharge from the city employment. The relator at that time claimed that such discharge, without charges preferred and without a hearing, was in violation of the provisions of section 22 of the State Civil Service Law. Opposing affidavits read at that time tended, among other things, to show that the relator's employment as foreman in the street department began

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on the 23d day of October, 1915, and that pursuant to section 9 of the Civil Service Law, and the local civil service rules, his appointment was probationary only for the period of three months.

The justice at Special Term, before whom the motion came, held that the relator was entitled to reinstatement or transfer to some new position for which he was fitted if he was a permanently appointed employee of the city at the time of his discharge, but held further that if he was serving as a probationary appointee at that time he was not entitled to reinstatement or transfer. See opinion in this case in 94 Misc. Rep. 360. The court therefore ordered an alternative writ of mandamus to issue to determine this question. Such a writ issued and the respondents filed answers and returns setting forth that the relator was a mere probationary employee.

When the proceeding came on to be heard at the Niagara Trial Term in March, 1917, the counsel for the relator conceded that the relator, on the 1st of January, 1916, was a probationary appointee only, the probationary period in its ordinary course not expiring until January 23, 1916, and the trial court made a decision and report finding the facts to that effect.

On behalf of the relator the attention of the court is now called to a decision which was not called to the attention of the court at the time that the matter was originally before the Special Term. This decision is *People ex rel. Kastor* v. *Kearny,* 164 N. Y. 64. In the course of the majority opinion in that case at page 66 Judge Landon says: " 'A probationary term ' or ' a period of probation ' implies definite or stated length of duration, especially so when such term or period is to be provided in advance. It is not ' any time ' within a fixed length of duration, unmeasured by the rules, and measurable by the pleasure or will of the appoint-

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ing power. Probation or probationary implies the purpose of the term or period, but not its length; the rules could fix its length, for so the statute provides, but could not make its length provisional in point of time, for that would be to unfix it or annex an unauthorized item. While the primary purpose of the law is to secure efficient service, yet the probationary appointee is thereby secured an experimental trial for the period prescribed by the law or the rules made in pursuance of the law, and he is not to be condemned pending the trial before the time, given him to show his fitness, has expired, except after an opportunity to explain under section 1543 of the charter."

On behalf of the respondents it is urged that while the case cited would be a binding authority if the application were for reinstatement merely, it is not an authority to the extent that it requires the public officials to transfer a probationary appointee as one "holding" a position within the meaning of section 22 of the Civil Service Law, the pertinent part of which is as follows: "If the position so held by any such honorably discharged soldier, sailor or marine, or volunteer fireman, shall become unnecessary or be abolished for reasons of economy or otherwise, the said honorably discharged soldier, sailor or marine or volunteer fireman holding the same shall not be discharged from the public service, but shall be transferred to any branch of the said service for duty in such position as he may be fitted to fill, receiving the same compensation therefor, and it is hereby made the duty of all persons clothed with power of appointment to make such transfer effective."

The reasoning, however, in *People ex rel. Kastor* v. *Kearny, supra,* in my opinion is as applicable to one situation as to the other. If the probationary appointee is entitled to protection in his position dur-

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ing the probationary term, so that he may show his fitness for permanent appointment during the entire probationary period, then for the same reason he must be held to be entitled to transfer upon the abolition of his position so that he may have the same complete period to show his fitness for appointment, even though during the period he occupies two different positions. No sound distinction can be predicated upon the use of the word "held" in the statute. The word "held" must include a probationary as well as a permanent occupancy of the office. In view of the authority cited, the question is not an open one, and the relator is entitled to a peremptory writ of mandamus providing for his transfer to some new position for which he is fitted.

On entering again upon his duties in the municipal service the relator will still be a probational employee entitled as matter of right to complete the unexpired portion of the probationary period, at the end of which he may be peremptorily discharged. *People ex rel. Hoeges* v. *Guilfoyle,* 61 App. Div. 187; *People ex rel. Kastor* v. *Kearny,* 36 Misc. Rep. 717.

Ordered accordingly.

Matter of the Transfer Tax upon the Estate of HETTY H. R. GREEN, Deceased.

(Surrogate's Court, New York County, April, 1917.)

Domicil — what constitutes — statutes — evidence — effect of amendment to section 243 of the Tax Law.

Transfer Tax Law — who deemed a resident of state of New York — taxes — evidence — Tax Law, § 220.

Though "domicil" and "residence" are different legal conceptions, "residence" may be used in a statute with the legal significance of "domicil."

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Misc.] Surrogate's Court, New York County, April, 1917.

The Transfer Tax Law of this state divides the persons who may make taxable transfers into two classes — "residents" and "nonresidents."

The domicil of a widow is *prima facie* that of her late husband and, though she may change it, the change, in order to constitute a new domicil, must be made *animo et facto*.

The amendment to section 243 of the Tax Law (Laws of 1916, chap. 551), which affects the law of domicil only in so far as to continue a residence for the greater part of twelve months, *prima facie* evidence of one element of domicil, construed.

It appearing from the evidence given before the appraiser in a transfer tax proceeding that decedent did not reside in the state of New York for some part of each of twelve consecutive months of the twenty-four next preceding her death, she is not to be deemed a resident of said state for the purposes of the transfer tax within the meaning of said amendment to section 243 of the Tax Law.

Proceeding remitted to the transfer tax appraiser for the purpose of appraising, under section 220 of the Tax Law, the estate of the decedent as a nonresident of this state.

ISSUE as to decedent's domicil in a proceeding to determine a transfer tax.

Alexander & Green (Charles W. Pierson, of counsel), for executor.

Lafayette B. Gleason (John B. Gleason, Charles M. Travis and Kenneth M. Spence, of counsel), for State Comptroller.

FOWLER, S. Upon the petition of Edward H. R. Green, to whom letters testamentary upon the estate of the decedent were granted by the Probate Court of the district of Westminster, state of Vermont, an appraiser was appointed by the surrogate to appraise the property of the decedent in accordance with the provisions of the Tax Law of this state. The executor

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alleged in his petition that the decedent was a resident of Bellows Falls, in the state of Vermont. This allegation was controverted by the state comptroller of the state of New York. Witnesses were then produced before the appraiser and examined on behalf of the estate. An issue of residence having been thus raised, the usual stipulation was entered into between the executor and the state comptroller, to the effect that the testimony taken before the appraiser should be used by the surrogate in determining the question of decedent's residence, in the same manner and to the same effect as if such testimony were taken before him. The issue is accordingly now before me for adjudication.

Evidence given before the appraiser on appraisals for tax purposes is generally informal in character, and the common-law rules of evidence, appropriate on trials by jury, are not strictly applied, and, indeed, in legal theory, have little application to such proceedings or inquisitions conducted by appraisers. But when a controverted issue of domicil or residence arises in the first instance, and the evidence is taken before the appraiser only for convenience and then certified to the surrogate for his decision thereon, the ordinary rules of evidence as applied in equity and in the courts of the surrogates are applicable, and the surrogate must consider objections and exceptions interposed by counsel. In this matter I find no substantial error, or no error which makes it imperative that the proceeding should be remitted to the appraiser for further action in conformity with the evidential rules of judicial procedure. I shall notice but the one objection made in behalf of the state to the reception of the affidavit of the executor, verified November 1, 1916. This objection is followed by a motion to strike the affidavit from the record. Such motion is resisted

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by counsel for the executor, who concedes in his printed reply-brief that the affidavit is not evidence *per se*. This concession, I think, obviates any necessity for judicial action. The affidavit was filed according to the usual practice on appraisals, and is, when controverted, in the nature of a pleading or statement of the positions assumed by the executor. In this instance the affidavit raises or presents constitutional objections which the executor is entitled to have remain in the record. It should not be stricken out, but as evidence it will be disregarded, the executor having subsequently appeared before the appraiser and given his testimony *viva voce*. It is his testimony, not his affidavit, which is now to be regarded as evidence in this proceeding.

On the hearing before the appraiser on the issue of residence witnesses were called and sworn and documents were introduced. The outline of the testimonial evidence may for convenience be summed up as follows: Hetty H. R. Green, the "decedent," as she is improperly termed under the taxing act, was born on November 22, 1834, at New Bedford, Mass., where her father then resided. The record before me does not disclose where the decedent resided from the date of her birth until immediately before the date of her marriage. It appears, however, that her father had acquired a house in this city of New York in the early part of 1867 and that he was living here at that time, and the decedent then lived with him. On July 11, 1867, she was married to Mr. Edward H. Green. Mr. Green was born at Bellows Falls, Vt.; he was in adult life engaged in business in Manila for some years prior to his marriage and resided there during his absence in the east, although he retained his home at Bellows Falls, Vt. Where he resided at the moment of marriage I shall consider later. Shortly after his

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marriage to the decedent they went to Europe and remained there for about eight years. Their children were born abroad. While in Europe Mr. Green sold his dwelling house at Bellows Falls. When Mr. Green and the decedent returned from Europe in 1875 they proceeded to the home of Mr. Green's mother at Bellows Falls and remained there during the summer. Between 1875 and 1879 the decedent and her husband stayed in lodgings or hotels while they were at Bellows Falls. In 1879 Mr. Green purchased an ancestral house at Bellows Falls known as the "Tucker House," and thereafter he and the decedent regularly spent their summers there. Mr. Green died on March 19, 1902. His estate was administered in Bellows Falls as the estate of a resident of Vermont. The record does show that Mr. Green and the decedent, from the time when the house known as the "Tucker House" at Bellows Falls was purchased by Mr. Green in 1879 until the date of his death, spent their summers at Bellows Falls. Mr. Green in fact died in the "Tucker House" at Bellows Falls. After his death the decedent continued to go to Bellows Falls each summer, except her last. The "Tucker House" at Bellows Falls was not occupied during the winter, and when decedent went there in summer she opened the house and stayed in it during the daytime, but she did not at all times sleep in it when alone. For some years prior to 1909 decedent and her daughter, Mrs. Matthew Astor Wilks, lived together, but the record does not show where. Between 1909 and 1916 the decedent passed much time at various boarding houses or hotels or in visiting friends in the city of New York and also much time at Hoboken, N. J. She did not own a residence here, nor did she lease any apartment here by the year. In the boarding houses at which she stayed she usually passed under an assumed name so as to

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protect her privacy from invasion. She paid taxes on personal property in the village of Bellows Falls for the years 1910 to 1915, inclusive. After her demise her will was admitted to probate in the Probate Court of the district of Westminster, Vermont, as a will of a resident of that state. In numerous documents executed by her during the years 1912, 1913, 1914 and 1915 decedent described herself as "Hetty H. R. Green, widow, of Bellows Falls, Windham County, Vermont." For some purpose, probably to shorten the inquiry before the appraisers, counsel for the executor conceded certain facts accepted by the counsel for the state comptroller as accurate. It was so conceded for the purpose of this proceeding that from 1902 to the date of decedent's death in July, 1916, she spent the greater part of each year in New York city or in Hoboken, N. J.; that subsequent to 1909 she spent from four to six weeks in each year at Bellows Falls; that the period of time during which she lived in Hoboken, N. J., each year did not exceed six months; that she did not rent an apartment by the year or for any definite period of time, and that she lived the remainder of each year at boarding houses in New York city. It is also conceded that from 1902 until the date of her death the city of New York was the center of her business activities; that even while she occupied a room in Hoboken she came to New York city every day for business purposes, and that during this period she had one or more safe deposit boxes in New York city and kept large deposits of cash in New York banks. The twenty-four months immediately prior to her death she spent approximately as follows: She left New York city for Bellows Falls early in July, 1914, and remained there until about August 18th; she returned to New York city on August 18th, 1914, and stayed here until about July, 1915; from July 20 to

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September 1, 1915, she stayed at Bellows Falls and vicinity; she returned to New York about September 1, 1915, and stayed here until about October 1st, when she went to Hoboken and remained there until November 24, 1915; from November 24, 1915, until the date of her death, July 3, 1916, she stayed in New York city, except that she stayed in Hoboken for a few days not exceeding a week at about the beginning of the year 1916. She was eighty-two years of age when she died, and was buried at Bellows Falls, Vt. Such in outline is the evidence now before me; and I shall refer to it more in detail as I proceed.

The record discloses that the question certified to me for decision concerns the last residence of Hetty H. R. Green, not her last domicil (see stipulation in the record). In *Matter of Martin,* 94 Misc. Rep. 81; in *Matter of Morgan,* 95 id. 451, and *Matter of Norton,* 96 id. 152, I endeavor to point out that domicil and residence are not synonyms in law, and that the Taxable Transfer Act of this state expressly designates two classes of persons subject to taxation, "residents" and "non-residents," and that in reality the principle of domicil was only applicable by way of analogy. But the Appellate Division in *Matter of Martin,* 173 App. Div. 1, held, as I read their decision, that "residents" in the act meant those "domiciled" here. Thus the question certified to me, under the decision of the Appellate Division, is really one of the last domicil of Mrs. Hetty H. R. Green. Domicil is a term of art, with a settled significance in law. I shall have occasion again to refer to the distinction between domicil and residence before I conclude.

This matter involves, then, not only a "domicil," but the "principle of domicil," the application of which is of acknowledged difficulty where the subject of the investigation has two or more residences in dif-

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ferent states or jurisdictions. It has been said in England that the "principle of domicil" better expresses what common lawyers mean by "domicil." The cause has been ably presented by counsel for both the state and the executor. They have not hesitated to refer to the primary sources of domicil, the Civil Law, *jus gentium,* and modern private international law, in addition to their citations of decisions of our own state.

In the long course of the modern development of the principle of domicil it was early admitted that a person might have as many domiciles as he had residences. But modern convenience or necessity has altered all this, and it is now held, in both English and American law, that a person can have but one domicil at a time for most legal purposes. *Forbes* v. *Forbes,* Kay, 341; *Dupuy* v. *Wurtz,* 53 N. Y. 556. He may be subject to various jurisdictions without inconvenience, but not to more than one law, and that law is with us to be determined by the principle of domicil. It has been said by publicists that to some extent the principle of domicil in the law of America has been slighted by a tendency to substitute the place of contract for domicil as the determining factor in too many cases. But be this as it may, in cases of this particular character, the principle of domicil is allowed to be controlling. A brief reference to the growth of the principle in our law is suggestive. As early as 1744, in *Pipon* v. *Pipon,* Ambler, 25, Lord Hardwicke intimated that domicil was the true solution where there was a conflict of laws in the same empire relating to successions to immovables. This was followed in 1750. *Thorne* v. *Watkins,* 2 Ves. Sr. 35. There the English precedents, which are part of the law of this state by constitutional limitation, end. Lord Loughboro's judgment in 1791 in *Sill* v. *Worswick,* 1 H. Bl. 690, comes too late to

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prescribe a rule which became a part of our territorial law. Since Independence the decisions of American courts have only amplified principles found elsewhere.

This matter now before me indicates the importance of some definitive law regulating the status of a citizen of a particular state of the Union sojourning or residing for some period out of that state, and in another state of the Federal Union. It also indicates, in some degree, the importance of determining the powers and the authority of the federal government to adjudicate the rights of citizens of particular states of the Union residing or sojourning within the borders of a state not their own. If there is no such federal law, then some day there will have to be a revision of the Constitution so as to enable the federal courts to determine the conflicting claims of tax collectors of different states against federal citizens who are also citizens of particular states.

In such conflicts there is already, I conceive, a primary principle which is rarely considered by state courts in cases of this character. Under the Fourteenth Amendment to the Federal Constitution every citizen now has a national citizenship, as contradistinguished from his or her citizenship of a particular state of the Union. *Slaughter House Cases,* 16 Wall. 36, 73; *United States* v. *Cruikshank,* 92 U. S. 542. The federal law regulating national citizenship alone determines the nationality of an American, as contradistinguished from his domicil, and it ought, I conceive, to be controlling in cases of this character, where a citizen of the United States is claimed to be domiciled legally in two or more states of the Union. That the federal law is here controlling I do not say. It is quite unnecessary in this cause to go so far. But where there is a conflict of state laws on the *status* or state

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citizenship of a particular citizen of the United States, the collision or conflict seems to present a federal question within the true meaning of the amended Constitution, and in the interest of order and good government it would be highly convenient if the federal law comes to be supreme on this point throughout the United States, just as the law of imperial Rome came to be supreme on all disputed points over Italian particularism and provincialism. In other words, particularism or provincialism should in America give way to some higher principle or authority, in order that the rights and dignity of federal citizens may be properly maintained throughout the Union. If not now territoriality in the instance of federal citizens will at a time not long distant defer to nationality. Then if the courts of Vermont shall hold that "A," a federal citizen, is a citizen of Vermont and the courts of New York shall also hold that he is at the same moment a citizen of New York, the nation may step in, in order that the evil consequences to "A" may be impartially prevented, or equitably adjusted, in some federal or national tribunal. This extension would be but an amplification of the theory of our Federal Constitution which makes federal law the arbiter of controversies between states or citizens of different states. It is of course probable that the judgment of the state court, first in order of time determining the liability, would be held binding and given effect everywhere by federal law, but this might be at the expense of the real principle of domicil or state citizenship. Such temporary evasions do not benefit in the end the substance of constitutional law.

I will not attempt to say what the federal law is on such points as those indicated, for no such points are before me for decision. But I will venture to say that it would be highly expedient in a federal republic, even

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where there is no active contest betwen the states of the Union over the particular state citizenship or the domicil of a deceased citizen of the United States, if conflicting assertions of two or more states against those taking the succession of the deceased citizen of the United States under the laws of one particular state could be made justiciable in some federal tribunal. Otherwise in America there will soon prove to be either too much law or too little for the convenience of a great country. At present neither nationality nor domicil, indeed not even the situation of property, seems controlling on the action of our state courts. Some controlling and definite principle should be soon enounced by competent authority. The hardship of subjecting personal property to a variety of succession duties, imposed by different sovereign states, was, I think, brought up in The Hague conference of 1900 upon private international law, but they did not act on it. It has been since proposed that the state which governs the succession to personalty should alone have the right to impose death duties. This seems an equitable proposition. The ominous and distressing increase in the necessities of states renders the burdens of double, treble or even quadruple succession duties, which they now seek to impose, a menace to private property, as understood for a period of at least five hundred years. What the ultimate effect of such excessive taxation will be on high civilization is not to my mind doubtful, although some persons in the states are inclined to disregard it.

Until all such questions as those outlined are set at rest by some supreme law of this nation, we are left in that condition of uncertainty which prevailed everywhere in Europe in the sixteenth and seventeenth centuries, when it was held that the law of the territory where one's personalty was found to be prevailed. The

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maxim then was: "*Bona tam mobilia quam immobilia regulantur juxta leges regni et loci in quo bona ea jacent et sita sunt.*" As late as 1630 it was still maintained by publicists, "*Bona personam non sequuntur, sed personas ipsas ad se trahunt.*" It was subsequent to the year 1700 that the maxim "*Mobilia sequuntur personam*" began to prevail as part of the *jus gentium* of Europe. Since then its recognition has become general throughout Christendom. The principle "*mobilia sequuntur personam*" is better expressed by the Civilians, "*mobilia inhaerent ossibus domini.*" But neither maxim gets us much ahead in determining a controverted modern domicil.

In the law of nations the nationality of a person whose status or right is in controversy is now generally the controlling factor, and that once determined, his public right and obligations are reasonably clear. But in a great federal state like the United States, or the modern Empire of Great Britain, the principle of nationality does not respond to actual requirements and therefore we in this country are driven to the principle of domicil, which is consequently much emphasized in the local laws of both England and America. Indeed, in respect of the personal property of a citizen of the United States, domicil has become extremely influential, if not always controlling. Westlake distinctly states that in England and the United States "domicil is the only possible criterion of a person being an Englishman or a Scotchman, a Marylander or a Louisianian." Internat. Law (Eng. ed.), pt. 1, p. 211. While this is true, there are some signs of reaction in this country. The tendency of modern state legislation in America, at least for the present, is to reassert the old supremacy of territorial law in respect of the personal property within the territory belonging to those not domiciled in the legislating

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state. In other words, the present tendency is for the state authorities to deny the complete force of the long established maxim, "*Mobilia sequuntur personam.*" If there is any federal power to correct this reaction, and I for one venture to believe that there is, it should be promptly invoked in the interest of the higher citizenship of the United States.

Although the question is not directly before me in this matter, I deem it my duty to make plain the real issue where there are conflicting claims of the states of the Union to tax citizens of the United States. If a citizen of Vermont, for example, enters the territory of New York state, sojourns there and dies there, what is the true extent and power of New York over the personal property or the succession coming from the said citizen of Vermont? In other words, is a citizen of Vermont subject to the laws of Vermont in any respect while resident in New York, or does he by a mere change of residence cease to be a citizen of Vermont and become subjected to the laws of New York only? So when the citizen of Vermont comes to die in New York is it the law of New York or the law of Vermont which ought to regulate the succession to his estate? These, if analyzed, are important questions. That there are certain general principles to be found in the law of nations which may determine the rule in each instance no one will deny. The trouble is that in fact they do not determine it. There is no law of nations which is binding equally on Vermont and on New York, and no rule unless it is some federal rule which serves between states of the Union as a law of nations. If there is now no federal rule, such a condition of things ought not long to be suffered to continue in a great federal domain like that of the United States. To allow the uncertainty to remain will prove

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prejudicial to the free intercourse contemplated by the Federal Constitution.

In my judgment the logical consequence of the decisions of the United States courts on the Fourteenth Amendment is that there is now a supreme federal law which ought to determine all such questions as those just outlined or intended to be suggested. *Matter of Morgan*, 95 Misc. Rep. 453. If this theory is sound, every case involving a conflict of state laws relative to the right of taxation on a succession from a federal citizen could be drawn into the federal courts in some way or at some time. If, on the other hand, this theory is erroneous, then I submit with all due deference that certain resonant statements in some great cases in the Supreme Court of the United States would have been more useful had they been pronounced with greater reserve. It may be well to emphasize at this point that on the continent of Europe the tendency is to presume that domicil is always determined by nationality, but it is not so in the United States or in the British Empire. I shall not, therefore, in the course of this opinion refer to the text of modern continental jurists. In this matter the surrogate is, as of course, bound to defer to the law of New York. While there is a modern tendency toward a community of law bearing upon interstate controversies, yet I apprehend that if there is any domestic law of New York bearing upon domicil the surrogate must follow it unreservedly. This is not a public court where principles of *jus gentium* are of supreme authority. This is a private court of a state, although it proceeds most generally *in rem*.

Fortunately, then, I am relieved from the necessity of considering high federal questions in this matter, for under the construction of the Appellate Division the only question now certified to me for decision is

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the last domicil of Mrs. H. H.R. Green at the moment of her death, and this is largely, though not altogether, a question of fact to be determined on the evidence. Unfortunately for its easier solution, domicil is not a pure question of fact. It is, more accurately speaking, a mixed question of law and fact, *i. e.*, the facts to be found may or may not establish domicil in law. The learned Phillimore correctly states, without reservation, that every question of domicil is one of law and fact. This being so, the question of Mrs. Green's last domicil becomes one of some difficulty under the authorities. The learned Appellate Division of this department has, however, relieved me from the necessity of considering whether commorancy or domicil is the real test of liability under the " Taxable Transfer Acts " of this state, for, in *Matter of Martin,* 173 App. Div. 1, they hold, as I said at the outset, that it is domicil and not residence which controls. I expressed my own doubt on this point in *Matter of Norton,* 96 Misc. Rep. 152, because the Transfer Tax Act expressly taxes residents, not those domiciled here. But under the decisions of the Appellate Division just cited the question certified to me for adjudication in this matter is not really the last " residence " of Mrs. Green, but her last " domicil." I am content to assume that this ruling of the Appellate Division is binding on me in this proceeding. In *Matter of Wrigley,* 8 Wend. 140; *Frost* v. *Brisbin,* 19 id. 11; *Haggard* v. *Morgan,* 5 N. Y. 422; *Bartlett* v. *Mayor,* 5 Sandf. 44, and *Matter of Newcomb,* 192 N. Y. 238, it was, however, held that domicil and residence are not in law synonymous. In *Bell* v. *Kennedy,* L. R. (1 Sc. App.) 320, Lord Westbury came to the same conclusion. The Roman law distinguished residence from domicil. D. 4, 6; D. 50, 17, 124. The decision of the Appellate Division in *Matter of Martin* is, however, in

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accord with the modern conception of publicists generally, and it relieves the issue in this matter of many embarrassments. It is said by publicists: "On the domicil of a capitalist rests the question of the government by which his personal taxes are to be imposed." Whart. Confl. Laws, § 20. Beale, the latest commentator on private international law, agrees with this when he says that domicil determines *status* in all common-law countries. Confl. Laws, pt. 1, p. 174. What, then, is this *status,* termed domicil, which is the crux of this inquiry?

It would be useless to refer to all the discordant definitions of domicil contained in the writings of publicists and in adjudicated cases. All such existing definitions fail at times to respond to particular requirements. That domicil in the common law denotes principles different from both Roman and early English law, Westlake states (p. 259, *et seq.*). Indeed, Lord Westbury has said that domicil now "is an idea of law." *Bell* v. *Kennedy,* L. R. (1 Sc. App.) 320. Certainly "domicil" in modern law is more than a residence, because it may exist without residence. Ortolan, 599. "Domicil" now is, I venture to think, the place which in law relatively determines the personal law to which a man or a woman is subject in the absence of any exceptional circumstances subjecting them to another law. Domicil is not in the law of our state determined by nationality, nor is it determined by residence alone in the absence of proof of *animus manendi* or *animus revertendi.* These points are, I think, established in this state beyond all controversy.

There is at common law no exact definition of domicil which responds to all purposes. Dicey Confl. Laws, 89; Wharton Confl. Laws, §§ 21, 22; Wheat. Internat. Law, 394; *Forbes* v. *Forbes,* Kay, 352. Mr. Dicey, in the last edition of his works, has much simplified his

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former precise and complex definition of domicil which I quote in *Matter of Robitaille,* 78 Misc. 112; *Cf. Matter of Norton,* 96 id. 154, 155. In my opinion, domicil is not determined by residence alone, nor by intention alone. Residence is preserved by the act, domicil by the intention. Ortolan, 599. A person may be absent from his domicil without effect. In the Roman law, absence from a domicil was treated with much refinement as "praiseworthy, blameless and dishonorable." D. 4, 6. I shall notice these distinctions at a subsequent place, for they are very indicative of subtle modern distinction.

The differences between Roman and Anglo-American law are obvious. In Roman law the question of domicil was immediately connected with that of local citizenship. Rome was the common country, or, as Modestinus said, "*Roma communis nostra patria est.*" D. 50, 1, 33. The question in Roman law was who was a "civis" or "municeps?" D. 50, 1. While the conceptions relative to all such points were in Roman law beautifully worked out, so much so as to be regarded as the basis of all modern law on domicil (Bentwich Domicile & Succession, 32), yet the Roman law does not respond to all modern exigencies and it has consequently been largely supplemented in England and America by conceptions of increasing value. In English and American law domicil relates to territory, not to localities within a political territory.

Notwithstanding the differences pointed out, the Roman definition of domicil, elaborated by the Civilians, must long remain influential in our common law. It is quoted at length in the elaborate brief for the state submitted to me in this very matter. It was referred to by Lord Mansfield in 1762 in the leading case of *Burns* v. *Cole,* Amb. 414, in the Privy Council, although not there reported, and frequently since in

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adjudications of authority in all courts. The Latin text of the definition is quoted and translated by our most learned Story at length. Story Confl. Laws, § 42. Story, like Savigny and all publicists, made free use of Latin writers, especially the Pandects. To Story, Latin was a practical organon. The definition of domicil taken by Story, Senior, from the *Corpus Juris*, but not quite correctly transcribed in his Conflict of Laws, is this (C. De incolis 10, 39, 7): "*In eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit; unde rursus non sit discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur, quod si rediit, peregrinari jam destitit.*" This definition is, as I said, cited to me in the brief for the state as a persistent definition of domicil. I shall have some observations to make on it in a more appropriate connection.

It is maintained, as stated at the outset, in common-law countries that a man can have only one domicil for most juridical purposes (*Matter of Newcomb*, 192 N. Y. 238; *Dupuy* v. *Wurtz*, 53 id. 556; *Forbes* v. *Forbes*, Kay, 341), and that every one must have a domicil. In passing I may observe that although this principle is distinctly denied in Roman law (D. 50, 1, 27), and is obviously untrue in some modern cases, yet I shall give heed to it as a matter of course, even if it is apparent that a foundling of unknown parentage, one who is a vagrant, for example, has no domicil, either of origin or of choice, either in law or in fact. One of the greatest judges in the history of this state, Edmunds, denied the accuracy of the proposition that every one must have a domicil. But this point is not now precisely here, and it need not be further considered.

Looking at her life history, it is evident that Mrs. Green's domicil of origin was Massachusetts. The

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effect of her father's subsequent removal to New York before her marriage does not figure in the case. Her husband's domicil of origin was Vermont, and this is not controverted. The evidence submitted to me also discloses that at the time of his marriage Vermont continued to be Mr. Green's domicil. His prior business residence in the east, at Manila, was of a temporary and commercial character, insufficient to change his nationality or his domicil. I think that there is a presumption in the common law that an American merchant residing in Asia or in the east intends to resume his national domicil or domicil of origin in the absence of clear proof to the contrary. The proofs before me certainly disclose that in 1867, at the time of his marriage, Mr. Green's domicil was again in Vermont. Vermont, then, in the absence of positive proof to the contrary, was what is termed the matrimonial domicil of the spouses. Mrs. Bancroft, a witness called for the estate, testifies that immediately after his marriage Mr. Green brought the decedent as a bride to Vermont and there they occupied a house.

Marriage is an international institution and more than a contract. It is, as Lord Stowell said in *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. 63: "*principium urbis et quasi seminarium reipublicæ.*" Story confirms this conception of the marital relation. Confl. Laws, § 108; Whart. Confl. Laws, § 127. And see *Hyde* v. *Hyde*, 1 P. & D. 130, 133. Consequently in all systems of law marriage creates a novel matrimonial domicil for the wife wherever her prior domicil may have been. At common law the matrimonial domicil of a wife is that of the husband at the time of her marriage. Westlake Priv. Internat. Law, §§ 361, 366; Whart. Confl. Laws, § 189; Dicey Confl. Laws, 511; Bentwich Domicile, p. 33; Merrill Confl. Law, 68.

Whatever Mrs. Green's domicil of origin, or her

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later imputed domicil of her father's subsequent choice, may have been, it was fully supplanted by her matrimonial domicil which was Vermont. Story Confl. Laws, § 46; Whart. Confl. Laws, § 189; Dicey Confl. Laws, 640, 643; Savigny Pri. Internat. Law, 56; *Dalhousie* v. *M'Doual,* 7 C. & F. 817; *Yelverton* v. *Yelverton,* 1 Sw. & Tr. 574; *Whitcomb* v. *Whitcomb,* 2 Cur. 351; *Hunt* v. *Hunt,* 72 N. Y. 217, 242.

The husband of decedent lived at the matrimonial domicil prior to the time of his death, and there he died and was interred in the last resting place of his respected and respectable fathers. A widow, in the absence of adequate proof to the contrary, retains the last domicil of her husband. The Roman law on this point, "*vidua mulier amissi mariti domicilium retinet*" (D. 30, 1, 22), is cited by Story with express approval, and it is adopted in all countries without exception. It is needless to enlarge on a proposition so universally accepted in all systems of law.

That a widow being again *sui juris* and no longer in law or in fact *sub potestate viri* may change her domicil (*Gout* v. *Zimmerman,* 5 N. C. 440; *Warrender* v. *Warrender,* 2 C. & F. 488) is not now questionable, and it is consequently contended in behalf of the state of New York in this proceeding that Mrs. Green, the decedent, did change her matrimonial domicil, and that she became domiciled in New York where she died so domiciled. This, however, is expressly denied by the representatives of Mrs. Green. Domicil is, therefore, the real and the only issue now here. I shall briefly survey again the proofs and contentions on this particular issue before proceeding to consider the law of the case.

That the Tucker House at Bellows Falls, Vt., at some periods of longer or shorter duration, was the "home" and the only actual home of the Green fam-

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ily after 1879, and during the rest of decedent's married life, the evidence before me, such as it is, amply discloses. If it is controlling that the home of the Greens is coextensive with their domicil and that Vermont was the matrimonial domicil of decedent until her husband's death, then I apprehend that the solution of the issue of decedent's last domicil is somewhat facilitated. That Mr. and Mrs. Green themselves regarded the Tucker House as their only home is apparent from their conduct and declarations given in evidence. That their actual residence at their titular home was intermittent is, however, also apparent. But even if absence therefrom be conceded, they had no other home during the husband's life, subsequent at least to his acquisition of the "Tucker House."

After her husband's death, Widow Green, the so-called decedent, according to the false terminology of our statute, when physically able passed her summers at Bellows Falls, Vt. The title to the Tucker House had devolved on her and the property now forms part of her estate. It was a furnished residence of some pretensions and long family associations. It was unquestionably the only "home" or permanent abiding place of a residential character that either Mr. or Mrs. Green is shown to have possessed during their whole married life. There their children were nurtured and partly educated, or brought up. But after her husband's death in 1902, and indeed to some extent before then, decedent passed more or less time away from Vermont in the transactions of her great business affairs in or about the city of New York. She passed portions of the summer only in Vermont, with the exception of the year 1916, when she did not resort to Vermont, being then too fatally ill in the city of New York. The controlling evidence on this point, stated in the admission of counsel,

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accepted by the state as correct, is as follows: "From the date of the death of the decedent's husband in 1902 down to the time of her death in July, 1916, the decedent spent the greater part of each year in New York City or in the vicinity of New York City, to wit, at Hoboken, N. J. Prior to the marriage of her daughter in the year 1909 she was in the habit of spending the entire summer season in Bellows Falls, Vt., except for occasional short business trips to New York City. After her daughter's marriage she ordinarily spent from four to six weeks in each year, except 1916, at Bellows Falls. The remainder of each year she spent in Hoboken, N. J., and in New York city, with the exception of short and infrequent periods when she was in Boston and other places on business matters. Her stays in Hoboken, N. J., did not exceed an aggregate of six months during any one year. While at Hoboken the decedent ordinarily stayed in apartment houses belonging to the Hoboken Land and Improvement Company. The decedent did not rent an apartment by the year or for any definite period of time, but occupied whatever apartment might be vacant and available for her use, relinquishing it when she left Hoboken. During the remainder of each year the decedent was in the city of New York, staying at various boarding houses and hotels and at houses of her friends."

The accepted admission of fact discloses that decedent, while absent from Vermont, passed as much time in the state of New Jersey as in the state of New York. She seems to have divided her sojourns between New York and New Jersey. This fact seems to me fatal to the pretensions of the state of New York that her domicil by reason of a *de facto* residence during all her absence from Vermont was in the state of New York. While actually in New York city (and it

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is not pretended that decedent was elsewhere while in New York state) Mrs. Green flitted from furnished lodging to furnished lodging. She had no permanent home in New York. At times she even visited friends in the city of New York. It cannot, however, be gainsaid that decedent passed much of the latter part of her life in New York city, engaged in the actual transaction of her vast business. But that she ever had a home in New York, or that she had a home anywhere out of Vermont, the evidence does not disclose.

That a domicil is in law in some way connected with the " home " or principal residence or abiding place of a person most systems of law and most jurists concede. Story Confl. Laws, § 41. The Roman definition of domicil cited by the state and quoted in this opinion at length is susceptible of greater emphasis on the element of home than even Mr. Dicey attributes to it in his somewhat novel exploitation of this element of domicil. Confl. Laws, 83, 84. English publicists rarely resort to such illustrations. Mr. Dicey evidently attaches new and far reaching importance to the legal definition of " home " as an element of domicil, at the same time admitting that " home " is not yet a term of art. He even elaborates a new and striking legal definition of " home " as an element of domicil. His observations are acute and convincing. It may, however, be not amiss for me to call attention to the fact that Mr. Dicey's emphasis of *home* as an element of domicil is much fortified by a translation of " *larem* " as " home " in the Roman passage transcribed in this opinion. Such a usage is quite justified, I think, by classical writers. Cicero, Virgil and Horace used " *lar* " in the sense of " home," although " *domus* " or the locative " *domi* " is undoubtedly the commoner Roman word for " home." Of Anglo-Americans Mr. Dicey is not alone in attaching importance to the fact

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of home in a solution of domicil. The distinguished lawyer, Mr. David Dudley Field, of our own bar, in his celebrated International Code (§ 280) defines domicil as "the seat or permanent residence — the *home.*" This, after all, is only a reversion to the main principle of Roman law (D. 50, 1; Cod., 10, 39) and the systems founded on it. Story Confl. Laws, § 41. Some further observations on the identity of the home and domicil in the origins of our law may not be amiss or misconstrued. They go to the root of our law.

That the Romans, as well as Mr. Dicey, regarded the "home" as a controlling element of domicil is, I think, apparent. *Domicilium,* indeed, primarily denotes "*home.*" Cicero, no inconsiderable jurist, in a passage in the "De Senectute (C. 21, ¶ 77), which I happened on the argument to remember, evidently means by domicil the home: "Est enim animus caelestis ex altissimo *domicilio* depressus et quasi demersus in terram, locum divinae *naturae* aeternitatique contrarium." In this beautiful passage of Cicero *domicilium,* it will be observed, stands for "real home" in the English tongue. The root "cel" in *domicilium* is said by the professional scholars to appear in "*celo*" and "*cella*" and the word "*domicilium,*" in the passage in the "De Senectute" just transcribed, is intended to convey the idea of a private and particular residence. It may be urged that De Senectute is a philosophical treatise, not a technical treatise like "De Legibus." But this fact does not detract from the meaning of *domicilium* in the passage cited. Nothing more is necessary to be added to emphasize what Mr. Dicey so admirably states concerning the importance of the element of an established "home" to any complete legal definition of domicil. I have now pointed out that the definition of domicil, taken from the Roman law and quoted by Story with

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approval and cited by the state in this proceeding, refers to "a home" as a criterion, and that the term *domicilium* itself intends the true home of the person whose status is the subject of inquiry.

While I remain quite of the opinion of Mr. Dicey that an established home is an important element of domicil, I do not overlook the fact that the mere possession of a house in a foreign place does not establish a domicil there. The Roman law was to that effect: "*Sola domus possessio quae in aliena civitate comparatur domicilium non facit*" (D. 1, 17, 13). But Mrs. Green's "Tucker House" was, I think, to her something more than the mere possession of a house. The house itself was her only regular or fixed home, and that home was at her matrimonial domicil. That home and no other was the seat of the really important associations of her entire married life.

It is, however, urged by the state that Mrs. Green's long continued absence from her Vermont home, and her protracted sojourns in New York are conclusive of a change of domicil without proof of her *animus*. But in *Dupuy* v. *Wurtz*, 53 N. Y. 556, 561, this proposition was, I think, denied, both in substance and in principle. I am not inclined to ignore the force, in the law of domicil, of a long continued actual residence, for I recognize that some jurists of distinction attach weight to a protracted residence as evidence of domicil. Westlake says: "Time is the grand ingredient in fixing domicil." Int. Law. pt. II, 114. Savigny, when criticising the modern concept, "domicil of origin," says: "Scarcely any course is possible but to assume a residence to be the domicil." Priv. Internat. Law, 87. But this in effect is only what Lord Thurlow states in *Bruce* v. *Bruce*, 3 Pat. App. 168; 6 Bro. 566; 2 B. & P. 230, that "residence is *prima facie* evidence of domicil." And see Story Confl. Laws, § 46. Now, when a

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thing is only *prima facie* so, the presumption is not one of law, but a mere rule of procedure. Certainly absence from an established domicil, no matter how long, does not *per se* constitute a new domicil or destroy the validity of the old domicil. I referred before to the classifications of absences from domicil made in the Roman law (D. 4, 6). An absence in that system might be praiseworthy, blameless or dishonorable. If on necessary business the absence was blameless, possibly praiseworthy, and did not prejudice or destroy the domicil. I applied this distinction in *Estate of De Lancey A. Kane,* 93 Misc. Rep. 406, where the deceased gentleman was shown to have been absent from his domicil for years, detained in New York by reason of an incurable illness. Such an absence I held was immaterial to his domicil of origin.

It is undoubtedly true that a long continued and non-intermittent residence in one place may conclusively negative in law a pronounced or declared intention to retain a domicil in another place to which the declarant or "*de cujus*" never resorts. This is merely an established exception to a general rule. Mr. Justice Holmes, in *Dickinson* v. *Brookline,* 181 Mass. 195, states the exception as follows: "Of course the argument for the plaintiff is that his domicil is presumed to continue until it is presumed to have been changed, that it would be changed only by his intent and overt act, and that he expressly denied the intent. The ambiguity is in the last proposition. The plaintiff did not deny that he intended to keep on living as he had lived for the last few years, and if the jury saw fit to find, as no doubt they did, that he did intend to do so, then he did intend the facts necessary to constitute a change of domicil, and that he did not intend was simply that those facts should have their inevitable legal consequences. * * * *When you intend the facts to*

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which the law attaches a consequence, you must abide the consequences, whether you intend it or not." This exception is confirmed in *National City Bank* v. *Hotchkiss,* 231 U. S. 50, 56, and elsewhere. Dicey Confl. Laws, 116, citing *Matter of Steer,* 3 H. & N. 594; Wheat. Internat. Law, 245; 6 Halsbury's Laws of England, VI, 186. I myself applied this exception in *Matter of Morgan,* 95 Misc. Rep. 451. But the facts and conditions, shown in all these cases last cited, justified the application of the principle or exception last stated. In this matter now before me Mrs. Green's residence in New York was of a character which makes the exceptional principle, I think, not controlling here. The Roman law, it should be observed, contained the same exception: *Domicilium, re et facto, transfertur non nuda contestatione* (D. 1. 1, 20), which Phillimore translates as follows: " Change of domicile is proved by facts and action, not by a simple declaration." If we translate " *nuda* " by our word "mere " and not by " simple " the Roman text precisely confirms the exceptional principles last denoted.

Mrs. Green had no home in New York. While here she resorted to various furnished lodgings, colloquially called " boarding houses," and her stays at them do not appear to have been either continuous or long. Her habits, in so far as these lodgings were concerned, were migratory. She can hardly be said even to have " lived " in them. She stopped at these peculiar inns because she was forced to be in or near the monetary center of the United States in order to conduct her financial affairs. She evidently found the boarding houses secluded and, what was more to her later taste, inexpensive. But she evinced no permanent intention of abiding in them, or of founding a permanent home in them in New York. Indeed, it is manifest that this is just what she did not intend to do. When a man or

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woman, stopping away from an established home of repute, resorts to inns or furnished lodgings, the presumption of law is that the stay, no matter how long, is of temporary character. Cicero well expresses the temporary nature of any resort to inns: *Commorandi enim natura devorsorium nobis non habitandi dedit.* De Senectute, 84. I may point out that in this passage *commorari* is the usual Latin word for staying at an inn. See Page's notes to his edition of third Ode of Horace, Lib. II. Lord Shaftesbury also well said: "If unhappily a man had been born in an inn * * * he would hardly, I think, circumscribe himself so narrowly as to accept a denomination or character" (*i. e.*, domicil) "from those local circumstances." Domicil, as we remember, is always a mixed matter of fact and law, dependent on both residence and intention — *factum et animus* (Story Confl. Laws, § 44), just as Lord Shaftesbury obviously implied in the passage quoted.

It is quite competent in cases of this character, when the intention of a person is necessary to be established in order to constitute a domicil, to analyze the elements of legal intention and for that purpose to weigh all the probabilities. The deceased lady and her husband, I may assume, were familiar to the old fashioned inhabitants of this city, for it is apparent that they had extensive connections here among those generally known by old fashioned Americans. They were by origin substantial New England people of good position, good birth, long traditions and excellent American associations both here and elsewhere. They well knew, I think, the difference between a "lodging" and a "home," between a residence and a domicil, and it is perfectly obvious from the evidence that Mrs. Green appreciated that she ought to have a regular family "home," and from her many declara-

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tions in evidence it is also apparent that she intended to have her legal domicil at that appropriate home. That she was, after her husband's death, most away from her home or domicil does not completely negative this plain intention. She was in later life apparently obsessed and overwhelmed by her large possessions and to some extent her obsession came to interfere with her old traditions, mode of life and natural associations; but I think it is apparent that she never willingly relinquished or abandoned her respectable and established domicil in Vermont for a lodging in New York.

The issue of domicil is now so complicated by modern conditions regulating mobility and by the incessant interlocking of local governmental and territorial regulations that an astute people, the French, see fit to provide in advance for its judicial solution. They allow the proof of intention — the main element of domicil — to be deduced from a declaration filed either in the city a Frenchman is quitting or in the one to which he resorts. Civil Code, § 104: "La Preuve de l'intention resultera d'une declaration expresse faite tant à la municipalité du lieu que l'on quittera qu'a celle du lieu ou l'on aura transféré son domicile." Can there be any doubt on the evidence before me that if this excellent law had been in force in the United States of America Mrs. Green would have formally declared Vermont to be her domicil and not New York? I think there is no doubt of this, as her so doing would alone conform to all her other written declarations put in evidence on the hearing.

It is a fixed rule of law that, once established, domicil is presumed to continue, in the absence of proof of another domicil. *Dupuy* v. *Wurtz*, 53 N. Y. 556; *Matter of Newcomb*, 192 id. 238; *Mitchell* v. *United States*, 21 Wall. 350. In order to make out a new domicil

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there must be a union of residence and intention — *factum et animus. Matter of Newcomb,* 192 N. Y. 250. In this matter before me proof of *animus,* or intention, to change, is, as I said, wholly lacking on the part of Mrs. Green. If it is to be inferred from her extended sojourns here only, then it can only be so inferred under the exception noticed above, and I have already held that her residence here was of a kind inadequate to bring her within the exception.

That Mrs. Hetty Green's domicil was Vermont and not New York is, I think, clearly established. Under the decision of the Appellate Division in *Matter of Martin, supra,* this finding would conclude her last residence under the Taxable Transfer Act of New York, for in *Matter of Martin,* as I understand it, it was held that a resident, referred to in that act, was one whose domicil was in New York. It is, however, now urged on the part of the state of New York that a recent act of this state (Laws of 1916, chap. 551), to which I shall refer again at length, has modified the law of domicil in this state so that any one dying here after a residence in the state for the greater part of twelve consecutive months in the twenty-four months next preceding death is to be deemed domiciled here. But if domicil is still the test of liability under the Taxable Transfer Act, I think this contention cannot be sustained. Chapter 551, Laws of 1916, affects the law of domicil only in so far as to continue a residence for the greater part of twelve months *prima facie* evidence of one element of domicil. This was the construction accorded in substance to a not dissimilar act of Ohio (*Rockefeller* v. *O'Brien,* 224 Fed. Rep. 541), and I think the construction is sound for ourselves. The act (Laws of 1916, chap. 551), therefore, can have no conclusive effect on the domicil of Mrs. Green, unless she herself is proven to have

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intended to relinquish her domicil in Vermont and to reconstitute it in New York. Now, there is no proof in the record of any such intention on her part. But there is another construction of chapter 551, Laws of 1916, which I feel bound to consider.

If I am in error in assuming that the Appellate Division, in *Matter of Martin*, intended to hold that the Taxable Transfer Act means by "resident" one domiciled here, then that act operates on two classes of successions: (1) those derived from residents, and (2) those derived from non-residents. Residence results from facts alone, not from intention. In law residence in something other than domicil. That it is competent for the legislature of the state of New York to tax successions from residents of the state, irrespective of their domicil, I do not doubt and have so stated before in *Matter of Morgan*, 96 Misc. Rep. 455. If a person whose domicil is not in this state voluntarily enter this state, and actually reside here, those taking in succession from her have no valid ground of complaint if she has been subjected to many taxes from which a non-resident, by the usage of nations, would have been exempt. Chapter 551, Laws of 1916, recently enacted, attempts to prescribe what constitutes a residence for the purpose of the Taxable Transfer Act. Chapter 551, Laws of 1916, purports to amend section 243 of the Taxable Transfer Act (Laws of 1909, chap. 62). The relevant portion of chapter 551, Laws of 1916, is as follows: "§ 243. Definitions. * * * For any and all purposes of this article, and for the just imposition of the transfer tax, every person shall be deemed to have died a resident, and not a non-resident, of the state of New York, if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the

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twenty-four months next preceding his or her death and also if when by formal written instrument executed within one year prior to his or her death or by last will he or she shall have declared himself or herself to be a resident or a citizen of this state, notwithstanding that from time to time during such twenty-four months such person may have sojourned outside of this state, and whether or not such person may or may not have voted or have been entitled to vote or have been assessed for taxes in this state; and also if and when such person shall have been a citizen of New York sojourning outside of this state. The burden of proof in a transfer tax proceeding shall be upon those claiming exemption by reason of the alleged nonresidence of the deceased. The wife of any person who would be deemed a resident under this section shall also be deemed a resident and her estate subject to the payment of a transfer tax as herein provided, unless said wife has a domicil separate from him."

It is urged by the representative of the state of New York that the act of 1916, as a mere amendment of section 243 of the Taxable Transfer Act, is to be justified and upheld as an extension of a classification of persons or successions subject to taxation in that it only defines "residents" and excludes certain persons from the class or status of non-residents. It is argued that it is entirely competent for the legislature to so enact, and that the contrary should not be held until an emergency arises. On the other hand, on the part of the executor of Mrs. Green it is urged that the act of 1916 is not a classification, but a mere statutory statement of a rule of evidence, to be entertained by the courts of the state under well-settled restrictions consonant with justice and established rules of judicial procedure. In other words, it is contended for the executor in substance that the statute furnishes a rule

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which governs the courts' procedure only on a *prima facie* case, and that the amendment is not conclusive in any other case, nor does it attempt to state a principle of substantive law. It is also urged in particular that chapter 551, Laws of 1916, does not affect the succession or tax to be laid in this matter because it is not retroactive in operation in any respect and therefore it does not embrace the inception of Mrs. Green's residence in this state, which was prior to the passage of the act. If this is so, her succession is not within the act. Such in substance, as I understand them, are the elaborate contentions of the parties in reference to the act of 1916. I will now proceed to the application of the act of 1916, assuming it to be relevant.

Section 220 of the Tax Law enumerates the various methods of transfers of property that are taxable under the Transfer Tax Law of this state. It divides the persons who make the taxable transfers into two classes — resident and non-resident; and it provides, generally, that the intangible property of a resident is taxable wherever such property may be located, while the intangible property of a non-resident, even when located in this state, is not subject to a tax. Therefore, in so far as intangible property is concerned, the classification provided in section 220 of the Tax Law is "resident" and "non-resident." It is obvious that if the legislature intended to add a new classification it would have amended the only section in the Tax Law which provides for such a classification, namely, section 220, instead of putting the amendment in the section devoted to definitions. Besides, if the legislature had intended to create a new classification of persons whose property when transferred in the manner specified in section 220 of the Tax Law would be subject to a transfer tax, it is reasonable to assume that they

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would have provided for the imposition of a tax on such transfers, but no such provision is made, for the taxation is on the transfer of property of residents, wherever situated, and on the tangible property of non-residents when located here. As the legislature, therefore, did not amend the section of the Tax Law which classifies the persons whose estates are liable to tax, and did not specify what property of the persons embraced within the alleged classification would be subject to a tax in this state, it is evident that the amendment of section 243, effected by chapter 551 of the Laws of 1916, did not create a new classification of persons whose property, when transferred in the manner provided by section 220, would be liable to taxation.

On the part of the state comptroller it is further contended that under the amendment effected by chapter 551 of the Laws of 1916, the decedent must be deemed a resident of this state within the meaning of that term in section 220 of the Tax Law, if it appears that she lived here more than six months of the twenty-four months immediately preceding her death. The portion of the amendment referred to reads as follows: "For any and all purposes of this article and for the just imposition of the transfer tax every person shall be deemed to have died a resident, and not a non-resident, of the state of New York, if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death." The word "deemed" is used in many sections of the Tax Law, and has been construed to mean that certain facts therein described shall have a certain legal effect, and that the facts being admitted the legal effect is conclusive. I am inclined to think that the legislature in the amendment

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effected by chapter 551 of the Laws of 1916 used the word "deemed" in the same sense in which it was theretofore used in various sections of the Tax Law, and that proof of the facts subsequently enumerated in the sentence in which the word is used was to be conclusive upon the question of a decedent's residence. That this was the intention of the legislature is apparent from an independent sentence in the amendment, which reads as follows: "The burden of proof in a transfer tax proceeding shall be upon those claiming exemption by reason of the alleged non-residence of the deceased." If the word "deemed" in the earlier part of the amendment were intended by the legislature merely to place upon the person claiming non-residence the burden of proving it, there would be no need of adding the independent sentence just quoted.

I cannot, however, agree with the contention of the state comptroller that the legislature by the amendment above quoted intended that a person who dwelt or lodged here for a period of six months and one day of the twenty-four months immediately preceding such person's death is to be deemed a resident of this state for the purpose of the transfer tax. Such an interpretation would result in such manifest injustice that I should be unwilling to accept it, unless the words of the statute were so clear and unequivocal as to admit of no other interpretation. It would, for instance, make a person a resident of this state and his estate subject to taxation as such, if he lived here for six months and one day and then sold his home here, bought a home in New Jersey and went immediately to live in the New Jersey home and lived there until the date of his death, seventeen months and twenty-nine days afterwards. I will not, therefore, assume that the legislature intended the effect which would necessarily result from the interpretation contended

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for by the state comptroller. I think that the use of the word "consecutive" shows that it was the intention of the legislature to make it essential that a person live in this state some part of each of twelve consecutive months, and in the aggregate the greater part of such twelve months of the twenty-four immediately prior to his death before he would be deemed a resident for the purpose of the Transfer Tax Act. As the statute was not intended to apply to a case where the residence of the decedent was not in dispute, but only to those cases where it was contended on behalf of the estate of a decedent that he was a non-resident, this interpretation would apply only to cases where the question of residence was in dispute, and, as the legislature makes the legal effect of the facts conclusive upon the question of residence, I am inclined to that interpretation which bears less heavily upon the taxpayer.

From the conceded facts and the evidence in this case I find that the decedent resided at Bellows Falls, Vt., from July 3, 1914, to August 15, 1914; that she resided in this state from August 15, 1914, to July 19, 1915; that she resided in Bellows Falls from July 19, 1915, to September 1, 1915; that she resided in this state from September 1, 1915, to October 1, 1915; that she resided in New Jersey from October 1, 1915, to November 24, 1915, and that she resided in this state from November 24, 1915, to July 3, 1916, except that she stayed in Hoboken for a few days not exceeding a week at about the beginning of the year 1916. From these facts it appears that decedent did not reside in the state of New York for some part of each of twelve consecutive months of the twenty-four immediately prior to her death, and under my interpretation of the amendment effected by chapter 551 of the Laws of 1916 she is not to be deemed a resident of the state of

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New York for the purpose of the transfer tax within the meaning of that amendment.

The proceeding will therefore be remitted to the transfer tax appraiser for the purpose of appraising the estate of the decedent as a non-resident of this state under section 220 of the Tax Law.

Decreed accordingly.

Matter of Proving the Last Will and Testament of CYNTHIA VAN TUYL, Deceased.

(Surrogate's Court, Schoharie County, April, 1917.)

Wills — probate of, when denied — when instrument is not subscribed "at the end."

Where the signature of a testatrix is preceded by the disposing parts of her will and followed by the nomination of the executor, the instrument is not subscribed by her "at the end" and probate thereof will be denied.

PROCEEDING for the probate of a will.

George M. Palmer, for proponent.

Alberti Baker, for Anna Van Tuyl, individually and as administratrix of Cynthia Van Tuyl, contestant.

BEEKMAN, S. The contestant has filed objections to the probate of the alleged will on the ground that the paper propounded as a will is not executed as a will and that it is not signed at the end thereof by the testatrix; that the proof is insufficient to show the due execution of the will, and that the petitioner is not a person interested as executor or otherwise, and is not in a position to ask for the probate of the said paper,

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and asks that probate be denied. There is no allegation of fraud or undue influence.

The following is a copy of the paper offered for probate, the same having been written on one page:

"I Cynthia Van Tuyl of the town and County of Schoharie, State of New York, being of sound mind and memory and understanding, do make my last will and testament, in manner and form following

First, I direct that my necessary funeral expenses, (which should not exceed Fifty Dollars) and inscription on my tomb stone and all my individual debts be first paid.

2nd I give and bequeath the balance of my personal property, of every name and nature (the balance of my estate) to George B. Effner of Cody, Wyoming,

"CYNTHIA VAN TUYL her X mark

In testimony whereof I have hereunto set my hand and seal and published and declared this to be my last will and testament in the presence of the witnesses named below this 3rd day of July 1914

3rd

I hereby appoint P. S. Clark as my executor.

Signed, sealed, declared and published by the said Cynthia Van Tuyl as and for her last will and testament, in the presence of us, who at her request, and in her presence, and in the presence of each other have subscribed our names as witnesses hereto.

"EDNA W. VAN TUYL

"GRICELLA VAN TUYL."

The subscribing witnesses in their written deposition testified that the testatrix in their presence subscribed her name to the said instrument by making her mark on said instrument where it appears following the words, "Cody, Wyoming, Cynthia Van Tuyl,"

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her said mark appearing between the words "her" and "mark."

Section 21 of Decedent Estate Law says: "Every last will and testatment of real or personal property, or both shall be executed and attested in the following manner:

"1. It shall be subscribed by the testator at the end of the will. * * *

"4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will at the request of the testator."

Testamentary papers similar to the above have been the subject of serious controversy in the courts for many years. To decide whether this instrument was signed by the testatrix "at the end," involves examination of a large number of cases in the Court of Appeals and also in the lower courts. An endeavor will be made to limit the discussion to those cases where the instrument is similar to the one a copy of which appears above.

The natural desire of the court is, if possible, to carry out the intention of a testator, as expressed in his testamentary paper, but in this case where the question of the legality of the execution of a will is to be determined the Court of Appeals in *Matter of O'Neil,* 91 N. Y. 516, and in *Matter of Whitney,* 153 id. 259, has spoken to the following effect, namely: That while wills are interpreted so as to carry out the intention of the testator, that rule cannot be invoked when construing the statute regarding their execution, as in the latter case courts do not consider the intention of the testator, but that of the legislature.

It is unnecessary here to discuss the evils against which the statute is intended to provide or the safeguards which are designed to be thrown around testamentary dispositions by the statute, for the object of

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the law is well understood and is stated in *Matter of Conway*, 124 N. Y. 457, as well as in several other cases cited herein. In *Matter of Whitney*, the court further states: "This statute has always been strictly construed and the will must be a completed whole signed by the testator and witnesses at the end thereof."

On the question of how material the facts and circumstances surrounding the execution of a will are, in *Matter of Hewitt*, 91 N. Y. 261, the opinion discloses that the counsel for the proponent in the Surrogate's Court claimed the right then and there to examine his witnesses to give proof of certain facts stated by him, but the surrogate declined to hear any evidence on the part of the proponent, and made a decree denying probate of the instrument upon the ground that the attesting witnesses did not sign their names at the end thereof. The Court of Appeals declared: "There was no error committed by the surrogate in refusing to hear the proofs offered on the part of the proponent. It would have been wholly unavailing to show that this will was in other respects properly executed; that there was some excuse for not placing the names of the witnesses at the end of the will; that there was the absence of fraud, and that the transaction was attended with entire good faith and fairness. The proof offered would not tend to show that the place where the signatures were signed was the end of the will. No proof could show that. That was a fact which could not be removed from the case by any evidence, and the requirement that the signatures should be at the end of the will could not be supplied by any evidence; and, hence, it was proper for the surrogate, upon the production of this instrument before him, to refuse to receive evidence and deny probate, just as he would have been authorized to do if the name of the testator, instead of being sub-

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scribed at the end of the will, had been simply written at its commencement." I call attention to this case to emphasize the decision of the courts that it is the statute, and not the will, which must be construed, and the length to which the Court of Appeals has gone in the disassociation of the paper writing itself together with the location of the signatures thereon, from the circumstances surrounding the execution of the alleged will.

The following three cases cited in the brief of the proponent are plainly distinguishable from the case at bar. In *Younger* v. *Duffie,* 94 N. Y. 535, the testimonium clause and a recital or certificate by a notary in the Kingdom of Spain (where the will was executed) of certain formalities follow the disposing parts of the will, and immediately thereunder followed the signatures of the testator, the three subscribing witnesses and the notary. The court in that case held that the testator and witnesses signed at the end of the will. It will be observed that nothing followed the signature of the testator and the signatures of the witnesses. In other words, no writing intervened between the signature of the testator and the end of the will.

In *Matter of Noon,* 31 Misc. Rep. 420, the testatrix prepared a will in her own handwriting, leaving a blank in the testimonium clause for the date of execution, and also leaving a blank space in the attestation clause, so that it then read, "Subscribed by——— the testatrix," etc. The testatrix in the presence of the witnesses filled in the date and wrote her name in the blank space in the attestation clause, and requested the witnesses to sign, at the same time declaring the paper to be her will. In this case no part of the will followed her signature, it being succeeded only by the balance of the attestation clause.

In *Matter of De Hart,* 67 Misc. Rep. 13, the will was

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holographic and was subscribed by the testatrix in substantially the same place and under the same circumstances as in the case last cited.

We will next discuss the question whether that part of the instrument preceding the words " Cynthia Van Tuyl her X mark " may be admitted to probate rejecting the part following including the appointment of an executor.

In the consideration of this question we are enlightened by several authorities among which *Sisters of Charity* v. *Kelly,* 67 N. Y. 409, has frequently been cited with approval.

The court said, after discussing other questions: " Besides this, it may not be said that the end of the will is at the place where the name ' *J. Kelly* ' appears. There follows it quite important parts of a will — the nomination of an executor, and the revocation of former wills. It is said that the whole testamentary disposition preceded that name, and that on rejecting the part naming an executor, there can be appointed an administrator with the will annexed. We cannot be sure that such was the purpose of the testator. There are cases, in which quite a material part of the intention and forecast of the testator, centers in the selection of persons to execute his testamentary purpose; where important trusts are created in behalf of natural persons, important charitable institutions are founded, or other large and far-reaching designs are shaped, and the administration and execution of them committed to the executors of the will, who are not named until the concluding clause of it. Indeed, it is not an unknown thing that the sole object of the making of a last will has been to appoint an executor, giving no testamentary disposition of the estate, but leaving the executor to dispose of it according to the statute of

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distribution; and such a will must be proved. (3 Redf. on Wills, 67.) So the clause of revocation of all former wills is sometimes of much import, and it is usually the final provision in a will. A will may become operative as a revocation of a former will, though inoperative in other respects. (*Laughton* v. *Atkins*, 1 Pick. 535.) Can we say that the end of the will has been found, until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name. It is to make a new law to say that where we find the name, there is the end of the will. The instrument offered is to be scanned, to learn where is the end of it as a completed whole; and at the end thus found, must the name of the testator be subscribed."

However much the court may desire to work out the apparently main testamentary scheme of the testator we cannot disregard the authorities and especially the language used by the court in *Matter of Blair*, 84 Hun, 581; affd. on opinion below, 152 N. Y. 645. "But the fact that no harm will be likely to result in this case from a probate of that part of the will which precedes the first signature of Blair, should not have much weight with the court, for the more important question after all is, whether the decision will establish a good or bad precedent."

In examining authorities we find the following two reported cases in which the form of the will was exactly similar to the one under consideration and in which also the disposing parts of the will precede the signature of the testator and the nomination of the executor, the date and the attestation clause follow the signature. Probate was denied in both cases. *Matter of Nies*, 13 N. Y. St. Repr. 756, decided in 1887, and *Matter*

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of Gedney, 17 Misc. Rep. 500. In the latter case Surrogate Betts is an able and well-considered opinion, says: "The statute having prescribed that the signature of the person making the will and the subscribing witnesses shall be at the end of the will, there they must be found, and the witnesses and the would-be testator must agree as to where the end of the will is. It will not do to allow the court to determine in every particular case what is a necessary part of the will, and what superfluous, nor to decide that the intention of the deceased can be effectuated by admitting that part of the paper propounded before his signature to probate as his will and rejecting that which may follow; if so, we should have the will of the court instead of the will of the deceased."

The Court of Appeals laid down the same doctrine in *Matter of O'Neill,* 91 N. Y. 516, saying: "The claim that such parts of the will as precede the signature may be received and the remainder rejected cannot be supported. The statute denies probate to a will not executed in accordance with its provisions. It is either valid or invalid as an entirety as far as its execution is concerned. It is undeniable that the portion following the testator's signature contains material provisions and formed part of his scheme in making a will. At all events we have no way of determining the *extent to which he deemed them material,* and cannot give effect to one part and deny force to another."

Matter of Field, 204 N. Y. 448, has been given consideration but the form of the will in that case, it will be observed, greatly differs from the will here. However, the court on page 457, in the *Field* case laid down the rule "The natural end of a will is where the draftsman stopped writing in the consecutive order of composition * * *. The will before us when read consecutively, as the mass of mankind would read it, has

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the signature at the physical and natural end thereof." In the *Van Tuyl* will, the signature of the testatrix is not where the draftsman stopped writing in the consecutive order of composition, neither is it at the physical and natural end.

A will somewhat similar in form was declared not signed at the end and denied probate in *McGuire* v. *Kerr*, 2 Bradf. 244.

So far as I have been able to ascertain, after considerable research, the decisions are uniform in holding that papers in the form of, and signed as, the one under consideration are not entitled to admission to probate under the statute quoted hereinabove. The paper propounded for probate in this proceeding is not subscribed by the testator at the end, and probate thereof and of the whole thereof is denied.

Probate denied.

FRITZ SCHULTZ, JR., CO., INC., Plaintiff, *v.* RAIMES & CO. Defendant (Actions 1, 2, 3, 4 and 5).

(City Court of the City of New York, Special Term, April, 1917.)

Treaties — construction of — when courts will take judicial notice that a state of war exists between United States and Germany — actions — when subject of Germany may sue in our courts — contracts.

Corporations — when corporation controlled by German citizens is entitled to sue on debts contracted in time of peace — who are not alien enemies — treaties — injunctions — motions and orders.

The courts will take judicial notice that on April 6, 1917, by proclamation of the President, a state of war was formally declared to exist between the United States and the Imperial German Government.

Under the treaty of 1799 between the kingdom of Prussia and the United States, which was affirmed by the treaty of 1828, and which provides that if war should arise between the two

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contracting parties the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts, settle their affairs and depart freely, a subject of Germany may sue in our courts provided he is a resident here and entitled to the protection extended by the President's proclamation.

A New Jersey corporation is a distinct entity and notwithstanding its practical control and ownership by a German corporation or by German citizens in control thereof is a citizen of the state of New Jersey and is entitled to the privileges and immunities of all citizens of the United States.

The said corporation did not upon the declaration of war between the two countries become an alien enemy and is entitled to sue on debts contracted in time of peace.

A motion to restrain *pendente bello* the prosecution of an action for debt brought by said corporation upon the ground that it was an alien enemy and, therefore, is *persona non standi in judicio* denied, with costs.

MOTION to restrain prosecution of five actions on the ground that plaintiff is an alien enemy.

Gerard Roberts, for motion.

Maxwell C. Katz, opposed.

MCAVOY, J. By the proclamation of the President on April 6, 1917, it was announced that a state of war between the United States and the Imperial German Government, which has been thrust upon the United States, is hereby formally declared, and all officers, civil and military, of the United States are specially directed to give undivided and willing support to those measures which may be adopted by the constitutional authorities in prosecuting the war to a successful issue and obtaining and securing a just peace. Therein is prescribed the conduct to be observed on the part of the people of the United States toward all natives, citizens, denizens or subjects of Germany who, under the law are alien enemies, and likewise are set forth

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the injunctions to all alien enemies with respect to their duties toward the United States and to the people thereof and to the people of the state and territories thereof.

The claim of the right to confiscate debts or restrain or suspend the prosecution of the remedies for the collection of debts contracted by individuals in time of peace and which remain due to subjects of the enemy at the declaration of war rests upon the broad principle that war gives to the sovereign or state full right to take the persons and confiscate the property of the enemy wherever found, and that while modern policy is more humane and wise in respect to mitigation of this rigid rule than was that of the ancients, yet this can only affect the exercise of the right and does not impair the right itself. In former times the right to confiscate debts was admitted as a doctrine of public law of the nations, and Grotius, Pufendorf and Bynkershoek pronounced in favor if it. Bynkershoek in his *Quaestiones Juris Publici,* says (Ponceau's Translation): "Actions and credits are by the law of nations not less under our dominion than other goods; why, therefore, might we pursue these and not those by the law of war?" And Pufendorf, in his *De Jure Naturae et Gentium,* speaks for the same power (Lib. 8, ch. 6, § 23). See also *De Jure Belli et Pacis,* Grotius (B [1], C. [1], § 6). Cicero states in his *De Officiis* that promises are not to be kept where the creditor becomes the enemy of the country of the debtor. Publicists and jurists of Europe generally hold favorably to this right except Vattel in his Law of Nations, who holds that at present (1758) a regard to the advantage and safety of commerce has induced all the sovereigns of Europe to act with less rigor in this point. For, he says, strangers trusted subjects of the foreign sovereign only from a firm persuasion that the custom generally

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received would be observed. Notwithstanding the weight of modern authority against the claim of right on the part of the sovereign or state to confiscate debts or funds of his enemy during the war the judicial trend of authority in this country is decidedly in support of the right. Mr. Justice Story, in the Supreme Court of the United States, laid down the right to confiscate debts and enemy property found in the country according to the rigorous doctrine of the elder jurists (*Brown* v. *United States,* 8 Cranch, 110) and he said that the opinion was fully confirmed by the judgment of the Supreme Court in *Ware* v. *Hylton,* 3 Dall. 199, where the doctrine was emphatically asseverated by some of the judges, reluctantly admitted by others and denied by none. See 1 Kent Comm. 65. It may therefore be maintained as a doctrine of public law of this country that it is purely a discretionary matter with the legislature of the Union whether or not to confiscate debts and prohibit suits therefor when contracted by our citizens and due to the enemy by a special enactment for that purpose, or it may consider such action as a naked and impolitic right condemned by the enlightened conscience and judgment of modern times, and therefore fail to assert it. It does not appear dogmatic doctrine in our country's laws of war that a declaration of the existence of such a condition of belligerency is alone sufficient *ex proprio vigore* to render void all obligations between our citizens and subjects of the alien enemy, or to suspend remedies for the enforcement of debts and dues. In the war with Great Britain in 1812 the question arose whether or not the declaration of war gave the right to seize enemy's property found on land at the commencement of hostilities and condemn the same as prize of war, in the absence of any legislative act which authorized such seizure and condemnation, and Chief Justice Marshall said that it

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was the universal practice, based upon the structure of our government, to forbear to seize and confiscate debts and credits which have been acquired in peace in the course of trade. *Brown* v. *United States, supra.* Bynkershoek, who maintains the broad principle in war that everything done against the enemy is lawful; that he may be destroyed, though unarmed and defenseless; that fraud or even poison may be employed against him; that the most unlimited right is acquired to his person and property, admits that war does not transfer to the sovereign a debt due to his enemy because, he says, the occupation which is had by war consists more in fact than in law. Let it not, however, be supposed that it is only true of actions that they are not condemned *ipso jure,* for other things also belonging to the enemy may be concealed and escape condemnation. Vattel, in his Law of Nations, observes that the sovereign can neither detain the person nor the property of those subjects of the enemy who are in his dominions at the time of the declaration.

Chitty, in his work on International Law, after stating generally the right of seizure, says: "In strict justice that right can take effect only on those possessions of a belligerent which have come into the hands of his adversary after the declaration of hostilities." It thus appears from authoritative opinions of publicists who have written modernly on the *jus belli* that war gives the right to confiscate, but does not itself confiscate property or debts of the enemy. Therefore, in the disposition of an application to expound the effect of the declaration of war lately had between the United States and the Imperial German Government a rule ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, which would be opposed to the most learned and respected opinion of modern jurists

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and publicists everywhere. There being no act of Congress as yet passed which bears upon this subject, nor a proclamation of the President under the authority conferred upon him by the resolution of Congress declaring a state of war to exist which confiscates enemy property within the United States upon a declaration of war, it seems to me entirely free from doubt that even an alien enemy may still sue in our courts provided he is a resident here and entitled to the protection which the President's proclamation extends to him. The proclamation of the President indeed contains words which, in their import, are susceptible of a construction adverse to a ruling in favor of the applicant. He says: "All alien enemies are enjoined to preserve the peace toward the United States and to refrain from crime against the public safety and from violating the laws of the United States and of the states and territories thereof, and to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby, or which may be from time to time, promulgated by the President, and so long as they shall conduct themselves in accordance with law they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States, and toward such alien enemies as conduct themselves in accordance with law all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

The conclusion or inference to be drawn seems irre-

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sistible. And of this proclamation judicial notice must be taken.

Moreover, if these views of the present status of public law in respect of the property and credits of alien enemies be not grounded upon true principle, there had been negotiated and adopted, as early as 1799, a treaty between the Kingdom of Prussia and the United States, which was affirmed by the treaty of 1828, article XXIII of which reads as follows: "If war should arise between the two contracting parties, the merchants of either country then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects, without molestation or hindrance, * * *." And article XXIV reads as follows: "* * * And it is declared, that neither the pretence, that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but on the contrary that the state of war is precisely that for which they are provided, and during which they are to be sacredly observed as the most acknowledged articles in the law of nature and nations."

This court must take judicial notice of the public acts of the United States and its several departments, and, therefore, until this treaty is denounced as non-operative it would seem to confer upon alien enemies of German nationality, notwithstanding the existence of a state of war, the right to collect their debts by whatever process or remedy the United States or its several states and territories afford, pursuant to the provisions of our Federal Constitution that the treaties of the United States with foreign powers shall be the law of the land, anything in the Constitution or laws of the several states to the contrary notwithstanding.

That war dissolves all treaties between the contract-

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ing parties is a principle enunciated by many of the legal writers upon public law, but as express promises and engagements of nations should be inviolable, and the duty of the nation is to take care that she be not engaged in anything contrary to the duties which she owes to herself and others, and as nations may in their treaties insert such clauses and conditions as they think proper to make them perpetual or temporary or dependent upon certain events, it is competent to agree to abandon this principle of the law of nations and to contract with a view to obviate its effect. Although the treaty may become very oppressive to one of the contracting parties, it is not thereby revoked. Its revocation or denouncement requires a public act of which the judicial courts, executives and legislative assemblies must take notice. Vattel's Law of Nations, book 2, chap. 2, p. 145.

It may be determined that notwithstanding the seeming cogency of the arguments for the right of the resident subject of the alien enemy to proceed in our courts either according to the principles of the public law of nations or pursuant to rights grounded upon the capitulations of the treaty heretofore mentioned between the Kingdom of Prussia and the United States that all trade and intercourse and rights of alien suitors have been suspended *ex necessitate*. If such be the rule, any interdiction against the prosecution of suits for the collection of debts by an alien enemy does not affect the plaintiff here, since, notwithstanding its practical control and ownership by the German corporation or the German citizens in control thereof, the law of this state, I maintain, holds the corporate body as a distinct entity from the alien owners of its stock, and consequently, though of foreign ownership, it is a citizen of the state of New Jersey and entitled to the privileges and immunities of all citizens of the United

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States. This argument seems sound according to the legal logic of our corporate law and its development. Obviously such claims are open to the use of the cloak of subterfuge against the enforcement of acts or proclamations designed to prevent the giving of aid or comfort to the enemy by means of moneys or things of value. But, if so, the proclamation containing the interdiction of nonintercourse between our citizens and those of the alien enemy must be strictly worded to accomplish the prevention of such an usage.

It is claimed by the plaintiff that this company is an American company for all intents and purposes in peace and war. The defendant admits that it is an American company in time of peace, but says that in time of war they are not to be barred by technicalities from showing its German constitution. This proposition is devoid of authority. The status of the plaintiff company remains unaffected by a state of war. In no recognized authority on international law or in the writings of any jurisconsults or publicists who have adverted to the subject is there any suggestion to the effect of the defendant's contention that a company is not an entity entirely apart from the nationality of its shareholders. In England, from which we derive many of our concepts of public law in relation to the conduct of war, it is held that the position of a company composed of foreign stockholders is not altered in time of war. *Amorduct Co.* v. *Defries,* 31 Times L. R. 69, 1914. Phillimore, in his treatise on International Law, volume 3, discusses the case of *Society for Propagation of the Gospel* v. *Wheeler,* 22 Fed. Cas. 758; 2 Gall. 105, and holds, with our courts, that in their corporate capacity members of the corporation have no such political relations as to denominate them *corporaliter* a subject or an alien enemy, and further, that the plea of alien enemy cannot apply to a corporation aggre-

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gate at all. "If it could," he says, "it would follow that a single stockholder of one of our banks residing in an enemy's country would disable the corporation to sustain any action in our courts." The same doctrine is laid down in Bacon's Abridgment and applied to an alien enemy. "And an alien enemy, for the same reason, viz, because he acts *en autre droit,* may sue as executor or administrator." 1 Bac. Abr. "Alien" D; "Abatement," B 3; 1 Salk. 46 pls. 1, 2; 1 Strange, 282; *Caroon's Case,* Cro. Car. 8; *Wyngate* v. *Mark,* Cro. Eliz. 275. Yet it might be a good plea, that the testator or intestate, at his decease, was an alien enemy. Skin. 370.

In *Society for the Propagation of the Gospel* v. *Wheeler,* 22 Fed. Cas. 758; 2 Gall. 105; Case No. 13,156 Mr. Justice Story says: "The defense of an alien enemy is by no means favored in the law (see Steph. Pl., Ed. 1824, p. 67), and some modern cases have gone a great way in discountenancing it, further, indeed, than seems consistent with the general rules of pleading. * * * In *Oppenheimer* v. *Levy* (2 Strange, 1082), to an action of assumpsit the defendant pleaded alien nee, without saying alien enemy, and the court held that, as an alien friend may maintain a personal action, and in order to abate the writ, the plaintiff should be shown to be an alien enemy, which is not to be presumed, nor the contrary necessary to be replied, therefore the plea was bad; and so the law had before that time been held (Dyer, 2). * * * In general an aggregate corporation is not in law deemed to have any commorancy, although the corporators have."

In England this matter has been lately decided by the learned Chief Justice Baron Reading, in actions brought for the purpose of determining whether during the war payment of a debt can be enforced by a company of which all the directors and shareholders

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are alien enemies. *Continental Tyre & Rubber Co., Lim.*, v. *Daimler Co., Lim.*, 1915, 1 K. B. 893. The company was incorporated in England under the "companies" acts to trade in motor car tires made in Germany by a company incorporated under German law. The German company formed a number of subsidiary companies in various parts of the world for the sale of these tires. The plaintiff company was formed for the purpose of selling such tires in the United Kingdom. All the shares except one of the English company (the plaintiff) were held by subjects of the German Empire residing in Germany. The directors were all subjects of the German Empire and resident in Germany. The business was managed by three residents of England. The defendants contended that the plaintiff company must be regarded as an alien enemy notwithstanding that it was a corporate body, and that as commercial intercourse between persons under the protection of the Crown and persons who are alien enemies is illegal, payment to the plaintiff must be illegal. It was also urged that the court must look at the substance and not the technicalities of the matter. Under the Trading with the Enemy Act, issued on September 9, 1914, payment to the plaintiff company would be illegal if the company were to be regarded as an alien enemy. The ruling there made squarely holds that a company or corporation is an entity created by virtue of statutory enactment. It was an English company before the war. By the outbreak of the war an English company does not cease to be an English company. "It remains an English company, regardless of the residence of its shareholders or directors, either before or after the declaration of war. * * * If the creation of the company could be treated as a mere technicality there would be considerable force in this argument," *e. g.*, that the entity should be swept aside and treated, not

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as an English, but as a German, company, and therefore as an alien enemy.

There, as here, it is undoubtedly the policy of the law to regard substance and to disregard form, to prevent the hindrance and hampering of justice by mere technicality, but it is equally true in this state, as in the United Kingdom, that substance must not be treated as form or swept aside as technicality because that course might appear convenient in a particular case. It is an obvious fallacy that an entity created by statute is or can be regarded during the war as a mere form or character because of the enemy character of its directors. Corporations, organized under our law, have a real existence with separate rights and liabilities as legal entities. They differ in person and in substance from the subscribers, shareholders and directors. This corporate body, organized in New Jersey and operating, pursuant to the protection of its laws and entitled to all the franchises and rights involved in its corporate existence, cannot be technically an American company and substantially a German company, except by the use of inaccurate and misleading language. It is not a mere name or mark or cloak or device to conceal the identity of persons, and it is not suggested that the company was formed for any dishonest or fraudulent purpose. It is a legal body clothed with the form prescribed by our legislature.

The consideration applicable to the decision in that case and the facts and circumstances of the alienation of the shareholders and directors are similar to the incidents of persons in this case, and the facts here are more favorable to the corporate body suing as a plaintiff. I find the high authority thus expounded by the Chief Justice of England, while not binding upon courts in this country, entitled to the highest respect and follow it unreservedly. While this judgment of

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the Court of Appeal was reversed in the House of Lords and Privy Council in June, 1916 (2 App. Cases, 1916, p. 307), yet as the earlier opinion is in entire harmony with our law as laid down in *Society for the Propagation of the Gospel* v. *Wheeler, supra,* I believe that the trial court should adhere to that which conforms to our own judicial holdings.

Finally, the court is invited to stay these causes upon the alleged ground of public policy that moneys derived from the prosecution of the suits would be used in giving aid and comfort to the enemy by transferring the fruits of the corporate recovery to the individuals resident in Germany, who are alien enemies. But courts are not empowered to declare grounds of public policy nor to allow considerations thereof to be grounds of judicial decision. It is the province of the statesman to discuss and of the legislature to determine what is best for the public good and to provide for it by proper enactment. It is not within judicial cognizance to speculate what is best or for the advantage of the community. Judicial power has not extended to the right to establish as law everything which it considers for the public good and to prohibit everything which it believes otherwise. See opinion of Lord Halsbury, in *Jansen's Case,* A. C. 496.

The motion to restrain the prosecution of these five actions *pendente bello* upon the ground that the plaintiff is an alien enemy, and therefore is *persona non standi in judicio,* is denied, with costs.

Motion denied, with costs.

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BRUNSWICK REALTY CO., Plaintiff, *v.* FRANKFORT INSURANCE CO., Defendant.

(Supreme Court, New York Special Term, April, 1917.)

Insurance (indemnity) — contracts of — contents of policy of — actions — pleading — judgments — negligence — when motion for judgment on the pleadings denied.

Though a contract of indemnity insurance confers upon the insurer the exclusive power to control the defense of an action brought against the insured for personal injuries, there is an implied obligation on the part of the insurer to exercise good faith and fair dealing with the insured to fulfill the contract.

Defendant issued its policy of insurance whereby it agreed to indemnify plaintiff against any loss or expense not exceeding a certain amount arising from any claims upon plaintiff for damages on account of personal injuries suffered by any one as a result of accident during a certain definite period. The policy contained the usual clauses forbidding the insured without defendant's consent to settle or adjust any claim asserted against it, or to interfere in any manner with defendant's defense of an action brought upon such claim. The complaint, in an action by the insured against the insurer for its refusal to consent to the settlement and adjustment of a claim for which an action was brought against the insured by one who had sustained serious injuries on property owned by the insured, in which action judgment was recovered against plaintiff herein, which it paid, considered, and held sufficient, and a motion by defendant for judgment on the pleadings will be denied as, against a demurrer, the allegations of fact were sufficient upon which to predicate the bad faith of defendant.

MOTION for judgment upon the pleadings.

John J. Vanse, for plaintiff

Wm. A. Jones, Jr., for defendant.

GREENBAUM, J. Defendant moves for judgment upon the pleadings upon the ground that the com-

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plaint is insufficient upon its face. The gravaman of the complaint is that the defendant refused to consent to settle and adjust a claim, in violation of its implied obligation to exercise good faith and fair dealing with the plaintiff under its contract or policy to indemnify the latter against any loss or expense which it might sustain on account of personal injury to any person during the period fixed in the policy. The complaint alleges in detail the terms of a contract or policy of insurance issued by defendant, whereby it agreed to indemnify the plaintiff against any loss or expense, not exceeding $5,000, arising from any claims upon plaintiff for damages on account of bodily injuries suffered by any person as a result of accident during a certain definite period; that one Krugler brought an action against plaintiff for injuries claiming $25,000 damages; that defendant undertook the defense of this action pursuant to the provisions of the policy; that prior to the trial of the action an offer to settle Krugler's claim for the sum of $5,000 or less was refused by defendant, although plaintiff requested and demanded the acceptance thereof; that defendant refused to permit plaintiff to pay said sum of $5,000 or less to said Krugler; that defendant was fully apprised before the making of the offer of compromise that "Krugler sustained serious injuries upon the property owned by the plaintiff * * * and the said Krugler had become permanently lame and disabled, as set forth in his complaint in said action * * * and that plaintiff had no defense to said Krugler's action and had no witnesses which it or defendant could call upon that trial * * * and that judgment would be obtained against the plaintiff and that said judgment would be in excess of the amount of insurance mentioned in and covered by said policy of insurance and in excess of the amount for

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which said Krugler and his attorney had so offered defendant to settle, compromise and adjust the said action and claim against this plaintiff; * * * that it (the defendant) would accept said offer of settlement and settle and adjust said action and claim with said Krugler if the plaintiff would pay one-half of the settlement, viz., two thousand five hundred dollars ($2,500); that said defendant improperly and in bad faith refused to make said settlement * * * and refused to allow this plaintiff to settle, compromise and adjust said Krugler's claim, and even refused the offer of this plaintiff then made to this defendant to pay one thousand dollars ($1,000) toward the said settlement;" that the defendant "with the knowledge aforesaid and without good cause insisted on a trial," which resulted in a verdict in favor of plaintiff for $8,000. It is also alleged that the defendant refused to prosecute an appeal from the judgment entered upon the verdict upon the alleged ground "that there were no good legal grounds to prosecute the appeal." The complaint further alleges the payment of the judgment and the loss thereof sustained by the plaintiff in the sum of $3,000, for which judgment is demanded. It also appears from the complaint that the policy or contract of insurance contains the usual clauses forbidding the plaintiff, without defendant's consent, to settle or adjust any claim asserted against it, or to interfere in any manner with defendant's defense of any action brought upon such claim. It seems to be fairly well recognized by the courts of this state and of other jurisdictions that, notwithstanding a policy of indemnity like the one under consideration confers upon the insurer the exclusive power to control the defense of the action brought against the insured, there nevertheless "is a contractual obligation of universal force which under-

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lies all written agreements. It is the obligation of good faith in carrying out what is written." *Brassil* v. *Maryland Casualty Co.*, 210 N. Y. 241. In the case just cited it was said that: "The defendant's failure to observe this requirement of the contract in suit is the thing upon which its liability may safely be predicated." In *Wisconsin Zinc Company* v. *Fidelity & Deposit Company*, 162 Wis. 39, the court significantly says: "The power of settlement given the insurer cannot be used for the purpose of fraud or oppression, and the courts, in so far as they have passed upon the question, hold that the power conferred must not be exercised in bad faith * * * While the defendant has the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct must not only result in damage to the plaintiff, but also in loss to itself. Neither could it exercise the right conferred for the purpose of perpetrating a fraud on the plaintiff." *McAleenan* v. *Massachusetts Bonding & Insurance Company*, 173 App. Div. 100; affd., 219 N. Y. 563, recognizes the salutary rule that "the insurer, having elected and undertaken to defend the action brought against the insured, had no right when it saw fit to do so to abandon the defense. It was obligated to take into consideration the interest which the insurer had, and especially so after judgment had been rendered which subjected him to a large liability." See, also *Schencke Piano Co.* v. *Philadelphia Casualty Co.*, 216 N. Y. 662, 663. The only remaining question is whether the complaint merely alleges conclusions of "bad faith" or sufficiently alleges facts in support of these conclusions. It would be bad pleading to allege evidence of facts. As against

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a demurrer, it seems to me that the complaint abounds in facts upon which the conclusions of bad faith may be predicated. In the case of *Wisconson Zinc Company, supra,* the "paucity of allegations of specific facts tending to show bad faith" was urged against the sufficiency of the complaint, but the court held that "pleadings are now construed on demurrer with exceeding liberality. No motion has been made to make the complaint more definite and certain." The complaint here considered cannot fairly be said to lack "paucity of specific facts." Defendant's motion for judgment is denied, with ten dollars costs.

Motion denied, with costs.

JENNIE S. BUCKLEY et al., Plaintiffs, *v.* ABRAHAM BEAVER et al., Defendants.

(Supreme Court, New York Special Term, April, 1917.)

Pleading — complaint — in action to foreclose mortgage — judgments — parties — deficiency — mortgages — when demurrer sustained.

The interest of an heir at law of a deceased mortgagor in the mortgaged property is subject to be wiped out by a judgment in foreclosure and, in case of a deficiency, judgment may be entered against the administratrix of the deceased mortgagor, she having been made a party to the foreclosure action, and collected out of property coming into her hands in due course of administration.

Where the complaint in an action to foreclose the mortgage sought to obtain judgment for deficiency individually against the widow and next of kin of the deceased mortgagor, who was personally liable for the mortgage debt, a demurrer by one of the heirs at law of the deceased mortgagor will be sustained.

DEMURRER to complaint.

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Bernard J. Tremmer for plaintiffs.

Max Monfreid, for defendants.

GREENBAUM, J. This is a demurrer by one of the heirs at law of one Harris Beaver to a complaint to foreclose a mortgage covering certain real property in which it is sought to obtain judgment for deficiency individually, against the widow and next of kin of said Harris Beaver, who was personally liable for the mortgage debt. The allegations of the complaint are insufficient to warrant a judgment of deficiency against the demurring defendant. The deficiency is only properly recoverable in this action against the personal representatives of the decedent, Harris Beaver, and can be collected from the administratrix of his estate, who has been made a party to this action, out of the property coming into her hands in due course of administration. *Glacius* v. *Fogel*, 88 N. Y. 434. The learned counsel for the plaintiff seems to misapprehend the effect of the provisions of the Code of Civil Procedure, upon which he relies. Section 1627 provides for the recovery of a deficiency judgment against one who is liable for the payment of a mortgage debt. Section 1628 merely forbids the maintenance of any action to recover any part of a mortgage debt without leave of the court: "While an action to foreclose * * * is pending or after final judgment." In section 101 of the Decedent Estate Law (formerly sec. 1843, Code Civ. Pro.), an heir at law of the mortgagor is liable for the debt of the decedent mortgagor to the extent of his interest in the real property that descended to him from the mortgagor. It thus follows that the premises covered by the mortgage are primarily liable for the payment of the mortgage debt.

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Olmstead v. *Latimer*, 158 N. Y. 313, 317. From the foregoing it necessarily follows that the interest of the heir at law in the premises in question is subject to be wiped out upon the foreclosure judgment that may be entered hereon, and if there be a deficiency upon the sale a judgment may be entered against the legal representatives of the decedent mortgagor. Should the plaintiffs be unable to collect the judgment against the estate they may, if the facts warrant, pursue the remedies provided in such cases. *Lawrence* v. *Binninger*, 112 App. Div. 241. The demurrer should be sustained and judgment granted in favor of the demurring defendant.

Demurrer sustained.

Matter of the Application of WILLIAM H. NUNEZ, for Payment of Award, etc., in Proceedings to Acquire Title to West Thirteenth Street, from Eighty-sixth Street to Gravesend Bay, Borough of Brooklyn.

(Supreme Court, Kings Special Term for Motions, April, 1917.)

Awards — when, cannot be sustained — in street opening proceedings — condemnation proceedings — statutes — Greater New York Charter, § 988 — municipal corporations — when application for award granted.

While a statute requiring the application of an award in a street opening proceeding towards the payment of an assessment for benefits is valid, a statute which deprives one person of interest on an award for property taken and allows it to other persons, or which requires one property owner to pay his assessment the day it falls due and even before it becomes a lien, and grants to others sixty days thereafter in which to make their payments, is both unjust and invalid and cannot be sustained.

The provision of section 988 of the Greater New York Charter (Laws of 1915, chap. 606) which, in street opening

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proceedings, gives the city the right to set off assessments against awards making the set-off effective as of the date the assessment was entered for collection, is as to an owner who receives an award, which under section 981 of the charter carries interest from the date of the report, and who is also assessed for benefits, unjust and illegal, as he is treated differently from an owner who merely receives an award or is merely assessed, in that he is deprived of interest to which every other owner of an award is entitled and is obliged to pay at least so much of his assessment as the award will pay, as soon as it is payable, though other owners who are merely assessed are given sixty days of grace without incurring any additional liability.

Though at the time of the making of the awards and the assessments in a street opening proceeding instituted by the city of New York a certain person was the owner of certain property taken and assessed both the award and the assessment were made in the name of "unknown owners." Later petitioner became the owner of the award and of the property covered by the assessment and still later he sold the property subject to the assessment. *Held*, that on his application for payment of the award the city was not entitled to have the award applied in partial payment of the assessment for benefit laid against the property which belonged to his predecessor in title.

APPLICATION for the payment of an award made to unknown owners.

Merle I. St. John, for motion.

Lamar Hardy, Corporation Counsel (Andrew C. Troy and Paul Jones, of counsel), opposed.

CROPSEY, J. This application is the usual one for payment of an award made to unknown owners. The court took the proof instead of sending the matter to a referee. The practice of referring such matters is unnecessary, involves delay and, unless they are sent to the official referees, causes the property owner

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additional expense. Only a few minutes are required to take all the proof. The petitioner has established his right to the awards. This is not disputed. The only controversy arises over the city's contention that the awards should be applied in partial payment of an assessment for benefit laid in this proceeding against property which belonged to petitioner's predecessor in title.

At the time of the making of the awards and assessment Andrew G. Cropsey was the owner of the property taken and of the property assessed, though both the awards and the assessment were made in the name of unknown owners. Later petitioner became the owner of the awards and of the property covered by the assessment, and still later sold the property subject to the assessment. He does not now own the property that is assessed but is entitled to the awards. The question is, can the city offset them against the assessment?

The question was considered by this court in *Matter of Jones*, 96 Misc. Rep. 32, which construed the effect of section 1007 of the Greater New York York Charter as it read prior to the general amendment of 1915, which repealed all the sections relating to the opening of streets, etc., and enacted others in their stead. Laws of 1915, chap. 606. That section on its face gave no authority to the city to set off an award against an assessment. It merely provided that the city could not, in certain situations, demand interest on the assessment. That it was never intended that this section should have any other effect or be given any different meaning is made plain by a consideration of its origin. It was first enacted by Laws of 1839, chapter 209, section 8, and in substantially the same language as later appeared in section 1007 of the charter. It was carried unchanged into

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the New York Consolidation Act (Laws of 1882, chap. 410, § 999), and then into the charter. When it was first enacted, the situation concerning the payment of awards and assessments was prescribed by the Revised Laws of 1813, chapter LXXXVI. Awards were not payable until four months after confirmation of the report (§ 183), while assessments became a lien at once and were payable "on demand," and, if not paid within thirty days after confirmation of the report, resort could be had to distress and sale. § 186. That is, an assessment became due and payment of it could be enforced long before the award was payable.

The amendment of 1839 was to meet this situation, and, while it made no change in the time of payment of either awards or assessments, it prevented the city from demanding interest under certain conditions. The amendment was manifestly intended to aid the property owner, and not to give any additional rights to the city. It prevented the city from collecting interest on the assessment, except on the excess of the amount the property owner was to pay over and above the amount he was to receive, "for, or in consequence of, any intervening time between the period fixed for the receipt of the amount of benefit and advantage, and the payment of the amount of loss and damage."

The intent of this amendment, especially in view of the situation that existed and that has been referred to, seems to be clear. It was to prevent a property owner from being charged any interest on his assessment (except on the excess of it above the award) until his award was payable. But the result in this matter is not affected, if it be construed to mean that no interest shall be charged until the award is actually paid, or that "the party in whose favor an award was made should have the benefit of the appli-

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cation of his award in extinguishment or reduction of the assessment as of the date the assessment was levied or would otherwise have drawn interest," as was held in the interest of the property owner. *Matter of Bankers Investing Co.*, 141 App. Div. 591, 597.

The purpose and intent of the enactment was to benefit the property owner, and under any construction of it that result followed. But there was nothing in the act to require the property owner to accept the benefit. Nor was it intended to give any benefits or rights to the city. The property owner having both an award and an assessment could save money under that amendment. This was true until other amendments were made, changing the provisions for interest on the award. When the change was made, providing that an award carried interest from the date of the report, there was no longer any reason for the statute in question. Its original purpose could not then be served. Its intended usefulness was at an end. And it would not then be of any benefit to the property owner if the rate of interest on the award and assessment were the same.

Under the present provisions, however, interest at six per cent runs on the award from the date of the report (Charter, § 981) and assessments carry no interest for sixty days after they are entered in the comptroller's books (Charter, § 987); if not then paid, interest runs at seven per cent and is calculated from the date the assessment becomes a lien (Charter, § 987), which is ten days after it is entered for collection in comptroller's books (Charter, § 159). So, in every case now, interest on an award runs for a considerable period before it begins to run on an assessment.

To construe the provision we have been considering as giving the city the right, regardless of the

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wishes of the property owner, to set off the award against the assessment, would result in many cases in the property owner losing money. This would be true in every case in which the question arose before the interest began to run on the assessment, and in many cases thereafter. In fact the construction the city would place upon it would prevent an owner from collecting his award although it was due and payable, if he owned property which was to be assessed, although the assessment was not payable and in fact may not have been determined. This situation could readily exist, for awards are frequently confirmed and the report as to assessment sent back for correction, with the result that they are not determined till months after the confirmation of the awards. And even if the assessments are confirmed at the same time as the awards, as they carry no interest for two months thereafter while the awards carry interest from the date of the report — that is, some time before the confirmation — the enforcement of the city's claim would cause a loss of interest to the owner, unless the question did not arise until so long after the interest had commenced to run on the assessments that the difference of one per cent in the rate would make up for the amount of interest earned on the awards during the time the assessments did not carry any.

In only one case to which the court's attention has been called has it been held that the city may enforce the set-off, or rather that it operates automatically without election or action either by the city or property owner. In most of the cases the courts were construing the provision in the interest of the property owner and in applications by the owner in which *he* sought to offset the award against the assessment and in which it was held that *he* had that right. *Mat-*

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ter of City of New York (*Church Ave.*), 91 App. Div. 553; *Matter of Bankers Investing Co.*, 141 id. 591; *Matter of Jackson Steinway Co.* v. *Prendergast*, 142 id. 905.

None of those cases holds that the city can exercise such a right of set-off against the wishes of the property owner. The only one that goes to that extent is *Matter of Fischer*, 149 App. Div. 618. That decision held that the award must be set off against the assessment as of the date the assessment became payable, and refused to allow interest on the award after that date. No prior decision required such a ruling and certainly the language of the statute did not, especially when its origin is known. In the *Fischer* case the awards became payable on January 5, 1911, and the assessments on January 10, 1911, when they were entered for collection. The assessment was paid on March 11, 1911, without interest, and payment of the award with interest was demanded and refused. The assessment did not carry interest, for it was paid within sixty days after it became payable. Greater N. Y. Charter, §§ 986, 987, adopted by Laws of 1915, chap. 606, prior thereto §§ 1005, 1006.

The award, however, did carry interest from the date of the report until it was paid, unless that was longer than six months after the entry of the order confirming the report, and also after that period if a proper demand was made. Greater N. Y. Charter, adopted by Laws of 1915, chap. 606, prior thereto § 1001.

The language of these sections is very plain and unmistakable, and it applies to *all* property owners. The *Fischer* decision made it applicable only to *some* of the owners. It refused to allow the interest on the award to which the owner of the award, in common with all others, was entitled. Unless such power is

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plainly given, it cannot be exercised. It cannot be inferred. Any doubt or uncertainty in the language used must be construed in favor of the property owner and against the city. *Ne-ha-sa-ne Park Assn.* v. *Floyd,* 167 N. Y. 431, 436; *City of Rochester* v. *Fourteenth Ward Assn.,* 183 id. 23, 30; *Tompkins* v. *Hunter,* 149 id. 117, 122, 123. A statute must be construed so as not to promote injustice. *Hayden* v. *Pierce,* 144 N. Y. 512, 516.

In the instant case the assessment was laid against "unknown" owners. The property owner was not, therefore, personally bound to pay it. *Haight* v. *City of New York,* 99 N. Y. 280. And no right of set-off exists unless definitely given by statute. *Genet* v. *City of Brooklyn,* 99 N. Y. 296, 304.

Attention has been called to the fact that there was no provision of law requiring such an unjust and discriminating result, but had there been it would have been illegal. Since the *Fischer* decision and in the general amendment of 1915, already mentioned, a new section, 988, was adopted. This took the place of former section 1007, which has been discussed, but is very different from it. This new section gives the property owner the right "at any time prior to receiving payment of the award" to apply to have it set off against his assessment, "and thereupon such set-off shall be made as of the date of the entry of the assessment for collection. If the award exceed the assessment, the city shall be liable for interest only on the amount of such excess. If the assessment exceed the award, the owner assessed shall be liable for interest on the amount of such excess as if no set-off had been made."

If a property owner elected to obtain such a set-off, he could not be heard to complain that it was not fair. And if this was the only provision, there would be no

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comment, for it would then be optional with the owner. But the same new section contains the further provision that "the city may, without the assent of the person entitled to the award, set off the assessment against the award. Such set-off shall be made by the city in the same manner and have the same effect as if made on the application of the person entitled to the award."

This new section does not provide for any automatic set-off. It clearly contemplates that there shall be no set-off unless either the property owner or the city elects to have it so. The owner "*may*" apply for it, and then it "*shall*" be made. The city "*may*" without the owner's assent make the set-off. The papers in the present case show that the city has not made the set-off. The affidavit submitted by the city states that the full amount of the assessment "is still unpaid and is now a lien on the award." Had the set-off been made, the assessment would have been partly paid.

But this provision which gives to the city this right of set-off is unjust, discriminatory and illegal. It makes the set-off effective as of the date the assessment was entered for collection. This is putting into the statute what was said in the *Fischer* case. It means, as it was held in that case, that the person who receives an award and is also assessed is treated differently from the person who merely receives an award or is merely assessed. The owner with both an award and an assessment is discriminated against. He is deprived of interest, to which every other owner of an award is entitled; and he is obliged to pay his assessment — or at least so much of it as the award will pay — as soon as it is payable, though others who are merely assessed have sixty additional

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days within which to pay their assessments without interest or penalty.

An additional discrimination is found in section 1019-a of the charter (added by Laws of 1915, chap. 598). That gives a property owner the right to have his assessment (if it exceeds three per cent of the valuation of the property exclusive of improvements) divided into ten annual payments. But the section excludes from its operation the property owner who is entitled to an award, except as to the portion of the assessment in excess of the award.

It is true that a proper statute requiring the application of an award towards the payment of an assessment has been upheld. *Genet* v. *City of Brooklyn,* 99 N. Y. 296. But an enactment which deprives one person of interest on an award for property taken and allows it to other persons, or which requires one property owner to pay his assessment the day it falls due (and before even it becomes a lien, Charter, § 159), and grants to others sixty days thereafter in which to make their payments without penalty, is both unjust and invalid. It should not and cannot be sustained. It takes from every owner of an award, who happens also to be assessed, a sum of money — or makes it possible for the city to do it. If the award and assessment were equal in amount, the owner would not receive any interest on his award, although the statute says it carries interest from the date of the report, which necessarily is some time before the report is confirmed, and although the assessment is not entered and cannot be until some time after the confirmation of the report and may not be entered for months thereafter, as is often the fact.

The owner should receive interest on his award from the date of the report, but this new section says he gets no interest, except on the excess of his award

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over the assessment. The person who was entitled to a similar award, but not obliged to meet an assessment, would receive interest on it, up to the time it was paid, unless that was more than six months after the report was confirmed. And a property owner, who was assessed a similar amount, would not be obliged to pay his assessment the very day it fell due, but would be given sixty days of grace without incurring any additional liability.

Why should the person who chances to be both entitled to an award and subject to an assessment be treated so differently from those who are either only entitled to an award or only subject to an assessment?

There is no justification for the discrimination. The motion is granted.

Motion granted.

CATHERINE E. VAN INGEN, Plaintiff, *v.* THE JEWISH HOSPITAL OF BROOKLYN, Defendant.

(Supreme Court, Kings Trial Term, April, 1917.)

Negligence — liability of hospital — automobiles — pleading — verdict — municipal corporations — when motion to dismiss complaint denied.

The defendant maintains a hospital in which the poor are treated without charge and others, who can, are required to pay. Plaintiff, who was neither a patient nor a beneficiary of defendant, was injured while riding in an automobile which was run into by an ambulance belonging to defendant in charge of its chauffeur. *Held,* that defendant was liable, though at the time of the accident the ambulance was responding to a call sent in by the police department, for which service defendant received pay from the city.

Motions to dismiss the complaint and for the direction of a verdict in favor of defendant, on which decision was reserved, denied, and a general verdict for plaintiff directed on special verdict of the jury.

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ACTION for negligence.

Caldwell & Holmes (Frank W. Holmes, of counsel), for plaintiff.

Amos H. Stephens (Benjamin C. Loder, of counsel), for defendant.

CROPSEY, J. The plaintiff was injured while riding in an automobile on a public highway. This machine was run into by an ambulance belonging to the defendant and in charge of its servant. The plaintiff has had a verdict, the jury finding that the negligence of the defendant's servant, in charge of the ambulance, was the cause of the collision. The verdict is amply supported by the proof and is proper, unless the defendant is immune from liability. That question arises on motions made to dismiss the complaint or direct a verdict for the defendant, decision on which was reserved.

The claim of the defendant to exemption from liability is two-fold: 1. Because it is a charitable corporation; and 2, because at the time of the accident it was performing a governmental duty for the city of New York. The defendant is a charitable organization, maintaining a hospital in which the poor are treated without charge and in which those who can afford it are required to pay, and also owning and operating two ambulances. These are in charge of its employees and are used for its purposes and also to respond to city calls, given through the police department under an arrangement by which the defendant receives $3,000 a year from the city for doing that work. At the time of the accident the ambulance was responding to a call sent in by the police department.

The defendant cites *Noble* v. *Hahnemann Hospital,*

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112 App. Div. 663, as authority for both its claims, and it is a fact that the opinion in that case does discuss both questions and does say that the defendant is not liable because it is a charitable corporation and because it was engaged in governmental work. The decision seems to have gone upon the first ground, the court saying (p. 665): "The defendant being a benevolent institution and no financial benefit accruing to its directors or managers, we think the doctrine of *respondeat superior* does not apply." After having thus decided the case, the opinion continues on to say that the defendant was performing an act for the city, of a governmental character, and hence was not liable. The first ground stated in the opinion has been held repeatedly not to be the law, and the second ground we submit is equally unsound.

That a charitable corporation is liable in this state for the negligence of its servants is no longer open to question. The only exception is in the case of beneficiaries or patients. *Kellogg* v. *Church Charity Foundation,* 128 App. Div. 214, 215, 218 and cases cited; *Schloendorff* v. *New York Hospital,* 211 N. Y. 125. In the case of beneficiaries it is held that they are deemed to have waived any claim by accepting the benefit of the charity, even though they were not voluntary recipients of it. And this rule has been carried so far as to hold that a criminal, sentenced under the law to an institution not maintained by the municipality, cannot recover for injuries sustained while there, caused by the negligence of its employees. *Corbett* v. *St. Vincent's Industrial School,* 79 App. Div. 334; affd., 177 N. Y. 16. As to outsiders, its liability is the same as that of any other person or corporation. *Hordern* v. *Salvation Army,* 199 N. Y. 233; *Kellogg* v. *Church Charity Foundation,* 203 id. 191.

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The plaintiff herein was not a patient or beneficiary of the defendant, so the latter cannot escape liability because it is a charitable body. Whether defendant is immune when engaged in a governmental work is a different question, and yet the principle underlying both questions is much the same. And that is whether the rule *respondeat superior* applies. In the case of a beneficiary that rule applies, but a recovery is denied on the theory of a waiver by the patient. If the rule also applies when the work being done is governmental in its nature, then the defendant is liable. Why should it not apply? The fact that charitable institutions are relieved from liability to free patients, only on the theory of waiver of claim and not because the rule *respondeat superior* does not apply, would seem to show that even where such corporations are engaged in governmental work that rule applies. Caring for a charity patient in a hospital is doing governmental work, just as much as operating an ambulance to bring him there. As there would be a liability to such a patient but for his waiver, and as there is no waiver in the case of a stranger, there must be a liability to them for the negligent acts of the corporation's servants.

There is no authority in this state determining this question, unless the language in *Noble* v. *Hahnemann Hospital,* 112 App. Div. 665, 666, which seems to be *obiter,* be deemed such. That language is (p. 666): "The defendant is the agent or representative of the city, and the same principle which gives freedom from liability to the city is also effective to exonerate the hospital corporation." But is this sound? Does that statement correctly state the law?

Municipalities are held to be immune from liability for the negligence of their servants only when they are engaged in the performance of some governmental

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work, and then only for one of two reasons, either that the act done was *ultra vires,* or that the employee doing it was not the servant of the municipality, and so the doctrine of *respondeat superior* did not apply. Dillon Mun. Corp. (5th ed.) §§ 1655–1664; *Maximilian* v. *City of New York,* 62 N. Y. 160; *Lefrois* v. *County of Monroe,* 162 id. 563. The exemption under the latter ground is not based merely upon the nature and character of the work being done. If it were, the person actually doing it would be immune; but that is not so. While a municipality is not liable for the negligent acts of a member of its police or fire departments, although committed in the performance of his duty (*Smith* v. *City of Rochester,* 76 N. Y. 506, 513; *Gaetjens* v. *City of New York,* 132 App. Div. 394; *Mayor, etc., of City N. Y.* v. *Workman,* 67 Fed. Rep. 347; *Woodhull* v. *City of New York,* 150 N. Y. 450; *Wilcox* v. *City of Rochester,* 190 id. 137), the policeman or fireman in question is personally liable. *Morse* v. *Sweenie,* 15 Ill. App. 486; *Nowell* v. *Wright,* 3 Allen, 166; *Butterfield* v. *City of Boston,* 148 Mass. 544, 546. The rule is correctly stated in *Moynihan* v. *Todd,* 188 Mass. 301, 305: "For a personal act of misfeasance, we are of opinion that a party should be held liable to one injured by it, as well when in the performance of a public duty as when otherwise engaged."

This principle is involved in the cases dealing with the liability for a dangerous condition of the highway in a town. Formerly a town was not liable for the condition of its highways (*People ex rel. Van Keuren* v. *Town Auditors,* 74 N. Y. 310), but the highway commissioners were liable when funds were available. *Hover* v. *Barkhoof,* 44 N. Y. 113; *Bennett* v. *Whitney,* 94 id. 302, 306. A statute was then passed making towns liable, and that was upheld (*Flansburg* v. *Town*

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of Elbridge, 205 N. Y. 423), but the highway commissioners also are liable for their neglect. *Campbell* v. *Powers,* 155 App. Div. 862; *Monk* v. *Town of New Utrecht,* 104 N. Y. 552, 557.

So, regardless of the work in which he was engaged at the time, it is clear that the defendant's chauffeur in charge of its ambulance would be personally liable for his negligent act which injured the plaintiff.

The exemption from liability of a municipality for acts which are not *ultra vires* is based on the proposition that the rule *respondeat superior* does not apply to acts of its employees done in carrying out the obligations of the state at large in the performance of its governmental functions, that in the doing of that work the employees are not the servants of the municipality but of the people or the public generally and are not performing any services for it *Maximilian* v. *Mayor,* 62 N. Y. 160. The fact that such service is not for the benefit of the municipality and that the latter realizes no profit from it is also mentioned.

These reasons do not apply to an individual or corporation doing governmental work. If they did, they should apply equally whether the services were rendered at the request of the municipality or voluntarily assumed without such request. And then it would follow that an individual would not be liable for his servant's negligence, if the servant was performing for him an act of charity. But this is not the law. The reverse is true and the employer would be liable in the case assumed. *Kellogg* v. *Church Charity Foundation,* 128 App. Div. 214, 217. The servant of an individual or corporation, charitable or otherwise, is not an employee of the public merely because he is performing for his master some governmental function. He is the servant of his employer while doing that work, just the same as he is while doing other work.

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His employer has the right to direct and control him, to discharge him and to hire another in his place. Every element of the relationship of master and servant exists between them. To hold that it does not would be contrary to the fact and would be arbitrarily making fiction take its place.

The defendant's contention would lead to this anomalous result: if an individual were doing the work here in question for the municipality, he would be liable if he personally operated the ambulance in a negligent manner, but not if he hired some one to operate it for him. A person is liable for his personal act of negligence, as the authorities previously cited show, even though it be committed in the performance of a governmental function. And it is inconsistent to hold that he is liable for his own negligent act and is not liable for the similar act of his servant, committed in doing his work under his direction. He should be equally liable for both. This situation can never arise in the case of a municipality, for it can act only through its employees.

This rule, *respondeat superior,* does apply in all cases except those in which a branch of the government is engaged in performing a purely public service which is imposed upon the people generally. There is no reason for extending the exemption from liability. And this is especially true when, as here, the concern doing the work for the municipality is paid for it. The defendant receives $3,000 a year from the city for answering such ambulance calls as are sent to it, the ambulance being used also for the private purposes of the defendant.

Where this question has arisen outside this state, it has been held that the employer of the person whose negligence caused the accident was liable, notwithstanding the act was committed in the performance

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of a governmental function. Cases involving the operation of charity ambulances, under circumstances similar to those in this case, hold that the defendant is liable. *O'Connell* v. *Merchants & P. Dist. Tel. Co.*, 167 Ky. 468; *Green* v. *Eden,* 24 Ind. App. 583. The distinction between suing the city for the negligence of one of its employees, and a private corporation with whom the city has made a contract to care for some of its property, for the negligence of its servants, is pointed out in *Gartland* v. *New York Zoological Society,* 135 App. Div. 163, 171. There it was held that the defendant was liable for the negligent act of its employee in the management of the Aquarium in New York city, it having contracted with the city to care for that building. The powers of the defendant in the cited case, to employ help, are set forth and their scope is noted. But they are no broader than the powers of the defendant in the instant case, for those are absolute. As the court there aptly said (p. 171): "No public officer in the city of New York has any such power as that over his subordinates. Such freedom of action is now reserved solely to private employers." There the defendant claimed exemption under the authorities holding the city not to be liable, but the court said (p. 171): "We find no authority to sustain the claims of the appellant and we think there is every reason why we should reject them. It controls parts of the city property upon which it states it receives millions of visitors every year. Its control over such property and buildings, the appointment, direction and discharge of its employees is absolute. With this power it should realize its responsibilities and be held to that measure of responsibility which every employer has to meet under the law." The same may well be said of this defendant.

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While the city is not liable for the negligent operation of its fire apparatus, a fire patrol corporation, operating pursuant to statute a service to aid in extinguishing fires and in preserving property, is liable even though it is doing the city's work, and has issued no stock and has no profits, and is partly supported by the city. *Newcomb* v. *Boston Protective Dept.*, 151 Mass. 215; *Bates* v. *Worcester Protective Dept.*, 177 id. 130, 134; *Muhs* v. *Fire Insurance Salvage Corps*, 89 App. Div. 389.

There is no good reason why the defendant should not be held liable for the negligent acts of its chauffeur. It is in an entirely different situation than a municipality. The defendant was not obliged to undertake the performance of the governmental functions. It was free to undertake the work or not, as it wished. It was not required to do it for the city. Having voluntarily assumed the work, it should not be exempt from liability for the acts of its employees. This should be so, if the work was done without pay, and there is greater reason for enforcing its liability when it is paid for rendering the service. There is no hardship to the defendant in enforcing the rule. It was not obliged to maintain the ambulance service for the city. When it saw fit to do so, whether for profit or for no profit, it necessarily assumed a responsibility which included a liability to strangers injured through the carelessness of its servants. If it would be relieved of this liability, it should not operate the ambulance.

The reserved motions must be denied and a general verdict for the plaintiff ordered upon the special verdict of the jury

Ordered accordingly.

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Matter of the Application of NATIONAL STONEMEAL COMPANY for a Writ of Mandamus against CHARLES S. WILSON, Commissioner of Agriculture of the State of New York.

(Supreme Court, New York Special Term, April, 1917.)

Mandamus — peremptory writ of — when motion for, denied — Agricultural Law, § 222.

Where the certificate filed by the manufacturer of a product known as "stonemeal" to be sold as a fertilizer, on his application to the commissioner of agriculture, under section 222 of the Agricultural Law for a license to do business in this state, shows that said product contains no nitrogen, no available phosphoric acid, no acid treated phosphate and no water soluble potash, but gives the analysis of the product showing that it is made up entirely of inorganic material, a motion for a peremptory writ of mandamus to compel the issuance of the license will be denied.

MOTION for a peremptory writ of mandamus.

Brown & Brown, for petitioner.

Egburt E. Woodbury, Attorney-General (Charles M. Stern, Deputy Attorney-General, of counsel), for Charles S. Wilson, Commissioner of Agriculture.

RUDD, J. Under an order to show cause granted upon the petition of the National Stonemeal Company the motion is made for a peremptory writ of mandamus requiring Charles S. Wilson, as commissioner of agriculture of the state of New York, to issue to the petitioner a license under section 222 of the

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Agricultural Law, permitting the petitioner to sell within the state of New York during the year 1917 a product known as "Stonemeal," as a material to be used as a fertilizer.

Section 222 of the Agricultural Law provides in substance that before any manufacturer shall sell in this state any commercial fertilizer or material to be used as a fertilizer the selling price of which exceeds five dollars per ton, the said manufacturer shall file prior to January first of each calendar year with the commissioner of agriculture a certified copy of the statement prescribed in section 220 of the Agricultural Law.

The petitioner alleges that such statement as required by section 220 of the Agricultural Law was filed.

The statement required by the law provides that the manufacturer shall among other things certify as to the composition of the article proposed to be sold as a fertilizer.

(4) The minimum per centum of each of the following constituents which may be contained therein:

(a) Nitrogen.

(b) Available phosphoric acid, except that in cases of undissolved bone, basic slag phosphate, wood ashes, untreated phosphate rock, garbage tankage and pulverized natural manures, the minimum per centum of total phosphoric acid may be substituted therefor.

(c) Potash soluble in distilled water.

The section makes further requirements to which reference is not made for the reason that consideration thereof is not necessary to the understanding of the question here involved

The petitioner filed a certified statement, which shows that the article, for the sale of which the petitioner asks a license from the agricultural department

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of the state, contains no nitrogen, no available phosphoric acid, no acid treated phosphate, and no water soluble potash.

Included in the statement filed by the petitioner is a statement of the analysis of the product. From this analysis it appears, according to the statement of the petitioner, that the article proposed to be sold as a fertilizer is made up entirely of inorganic material.

Section 222 of the Agricultural Law provides that "Each manufacturer * * * or person who has complied with the provisions of this article * * * shall be entitled to receive a certificate from the commissioner of agriculture" to that effect.

The attitude of the commissioner of agriculture is that the petitioner here is not entitled to a license to sell its product for the reason that the certificate filed by the petitioner shows that the article contains no nitrogen, no available phosphoric acid, no acid treated phosphate and no water soluble potash.

The provision of the Agricultural Law requiring the statement to be certified showing the minimum per cent of the constituent parts mentioned is evidently clearly for the purpose of showing to the commissioner of agriculture, who has the responsibility for the issuance of the license to sell, that such constituent parts are contained in the article to be sold as a fertilizer, at least to the minimum per cent certified by the manufacturer or seller.

That requirement of certification, as to the minimum per cent of the constituent parts, means something, and the certifying that the article to be sold as a fertilizer contains no per cent of either or any of the articles is a justification to the commissioner of agriculture in reaching the determination in his mind that the article proposed to be sold is not a fertilizer recognized by the law.

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The purpose of the law is to protect the buyer, whose desire is to secure a fertilizer, as against the purchase by him of something that is not a fertilizer.

The petitioner here contends that such a question may be a question of fact not to be determined upon this motion which seeks a peremptory writ of mandamus.

It might be a question of fact as between differing authorities as to what constitutes a fertilizer; but in view of the statute which calls upon the petitioner to show the minimum per cent of certain specific constituent parts would convey, at least to the minds of some, that there was significance in the requirement.

The petitioner contends that by the filing of a statement to the effect that its product contains no per centum of any of the articles mentioned, and because it has filed such statement, therefore it has complied with the statute, and by reason thereof it is entitled to a license from the commissioner of agriculture.

The court is asked to grant a peremptory writ of mandamus compelling the issuance by the commissioner of agriculture of a license based upon that form of a certificate.

If this was done it would mean that there was no force or effect in the provisions of the Agricultural Law which requires a certificate giving certain specific information, upon which, with other information thus furnished, is or should be based the granting of the license by the commissioner of agriculture.

It does not seem to this court that the commissioner of agriculture would be justified in ignoring what seems to be a plain provision of the statute, which calls upon the applicant for a license to furnish certain information.

If the applicant does not furnish the information

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upon which the commissioner should base the granting of the license, this court, by a peremptory writ of mandamus, should not compel the commissioner to issue a license. The motion is denied, with costs.

Motion denied, with costs.

KATHERINE A. BEEBE, as Administratrix of the Goods, Chattels and Credits of FLETCHER S. BEEBE, Deceased, Plaintiff, *v.* SPENCER G. PRIME, Defendant.

(Supreme Court, Essex Special Term, April, 1917.)

Injunctions — pendente lite — when granted — chattel mortgages — executors and administrators — Surrogate's Court.

A copy of a chattel mortgage given in 1914 was seasonably filed in the proper clerk's office, and the mortgage was refiled in 1915, but not in 1916. *Held,* that though the mortgage was invalid as against the creditors of the mortgagor, his administratrix, who was in possession of the mortgaged chattels, some of which were included in the inventory of the estate filed in the Surrogate's Court, will be granted an injunction *pendente lite* in an action to permanently enjoin the enforcement of the mortgage.

APPLICATION for an injunction pending the action.

O. B. Brewster, for plaintiff.

Charles J. Vert and Raymond C. Price, for defendant.

PYRKE, County J. This action is brought to permanently enjoin the defendant from enforcing a chattel mortgage given by the plaintiff's intestate on June 1, 1914. A copy of the mortgage was seasonably filed

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in the proper clerk's office. It was refiled in 1915, but was not refiled in 1916.

The estate represented by the plaintiff is insolvent.

The plaintiff seeks to enjoin the defendant from enforcing the mortgage, upon the theory that it became void as to creditors upon the expiration of the period for refiling in 1916. The defendant opposes the application for injunction, upon the ground that the plaintiff represents no judgment creditor, and that no ground for injunctive relief has been shown. I have reached the conclusion that neither of these opposing points is well taken.

The statute of course declares that a chattel mortgage not refiled "shall be invalid as against creditors of the mortgagor." The familiar rule that creditors must be "armed with some legal process authorizing a seizure of the property" in order to attack an unfiled or unrefiled chattel mortgage is a rule formulated by the court for the obvious purpose of compelling orderly procedure. The reason for the rule is referred to in *Karst* v. *Gane,* 136 N. Y. 316, 323, as follows: "The mortgage * * * cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against the property, for creditors cannot interfere with the property of the debtor without process."

This reasoning is further amplified in *Skilton* v. *Codington,* 185 N. Y. 80, 87, as follows: "The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable it is not an indispensable requisite to enforcing the rights of the creditor."

The reason for the rule wholly fails in a case like this, and where the reason fails the rule should be held inapplicable. Here there is no interference with

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a debtor's property by a creditor without process. In this case the mortgaged chattels continued in the possession of the mortgagor until his death, came into the possession of the plaintiff upon her appointment, and have there remained. There is reason in the rule that a creditor should not be permitted to interfere with his debtor's property until his claim against the debtor has been adjudicated, but here there has been an adjudication. By the terms of section 2680 of the Code of Civil Procedure, where a claim has been admitted by an executor or administrator, the debt is deemed established; and has practically the force of a judgment. There seems to be no bar, therefore, to the plaintiff's attacking the validity of this mortgage. She has the property in her possession and she represents creditors whose claims have been adjudicated.

In the *Skilton Case, supra,* the court intimated that where the recovery of a judgment became impracticable it could be dispensed with. Where the debtor has died it seems to me that the recovery of a judgment can be said to be impracticable. It is impracticable in the sense that it would serve no useful purpose. While a judgment may be recovered against the representatives of a debtor, no lien upon the personal assets of the estate may be obtained, because no execution can be issued without an order of the Surrogate's Court, and no order will be granted where the effect would be to disturb the equality of distribution which the law contemplates.

The only direct authority in this state which has come to my attention is *Matter of McGovern,* 118 N. Y. Supp. 378. It was there held that a chattel mortgage which had not been refiled "was void as against the administratrix in so far as she represented the creditors of the deceased, although it was valid as against his next of kin." The doctrine of

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that case is, as it seems to me, sound, and should be followed.

The situation in my judgment calls for the extension of injunctive relief. As above stated, the mortgaged chattels are in the possession of the administratrix. Some of them are included in the inventory on file in the office of the Surrogate's Court. The administratrix while theoretically representing next of kin, as well as creditors, in any beneficial sense represents only creditors, as the estate is insolvent. The mortgage being void as against creditors, it is the duty of the administratrix to defend her possession. If the defendant were seeking to enforce his mortgage by action, the administratrix would have an adequate remedy by answering in the action. The defendant, however, is seeking to enforce his mortgage by seizure and sale, and the only remedy open to the administratrix to protect her possession, other than the use of force, is an appeal to a court of equity and her appeal should be heeded. The defendant being of ample responsibility, it is argued that the administratrix has an adequate remedy, if the chattels are taken from her possession, by way of an action against the defendant for the value of the chattels. This, in my judgment, involves a circuity of action and does not afford a satisfactory remedy. In *Matter of McGovern, supra,* the administratrix was held accountable to the general creditors for failing to protect their rights by resisting the enforcement of the void chattel mortgage, which the court said it was her duty to contest for the preservation of the estate. With the plaintiff facing personal liability, it strikes me as decidedly wrong to deny her the means for protecting the assets of the estate in her possession, upon the assumption that if they are

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wrongfully taken from her, she will be successful in recovering their value

An order may be entered restraining the defendant during the pendency of the action from interfering with the chattels in question.

Ordered accordingly.

ANNE E. BECKER and J. WADE BECKER, as Administrators of the Estate of DE WITT C. BECKER, Deceased, Plaintiffs, *v.* D. BUREN FULLER and TOWN OF PERINTON, Defendants.

(Supreme Court, Monroe Special Term, April, 1917.)

Pleading — allegations of complaint — in action by bank to recover amount of overdraft — banks — demurrer.

In an action by a bank to recover the amount of a depositor's overdraft due to the issuance of a New York draft which exceeded the amount of his account, the complaint need not allege his promise to pay.

DEMURRER to complaint.

Lewis, McKay & Bown, for plaintiffs.

Werner & Harris, for defendant Fuller.

RODENBECK, J. Defendant Fuller alone demurs to the complaint on the ground of its insufficiency. The complaint states a cause of action for overdraft of funds of the bank formerly conducted by the plaintiffs' intestate. The complaint alleges that Fuller was a town collector and kept an account at the bank; that he obtained a New York draft from the bank which was charged to his account and overdrew it in the sum of $1,109.87; that subsequent deposits were not sufficient to meet the overdraft and that there is

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due the plaintiffs on such overdraft the amount for which judgment is demanded. The allegation that defendant Fuller overdrew his account is not a conclusion of law but a statement of fact which is accompanied by the further statement that this was accomplished by obtaining a New York draft, the amount of which was charged to his account. The transaction is in the nature of a loan made at the request of the defendant Fuller upon an implied promise to repay the same. Where a New York draft is issued to a depositor and the amount is charged to his account which is insufficient to meet the draft, such insufficiency constitutes an overdraft and no allegation is necessary in a complaint upon the overdraft of a promise to pay as the overdraft is in the nature of a loan made at the request of the defendant who impliedly promises to pay the same. Morse Banks & Banking (4th ed.), § 357; *People's National Bank of Middleton* v. *Rhoades,* 90 Atl. Rep. (Del.) 409; *Hudson Trust Co.* v. *Chappelle,* 108 N. Y. Supp. 1005. The demurrer is overruled.

Demurrer overruled.

Lillian McStay and William H. Brown, as Administrators, etc., Plaintiffs, *v.* Erie Railroad Company, Defendant.

(Supreme Court, Monroe Special Term, April, 1917.)

New trial — when motion for, not granted — verdict — evidence — Code Civ. Pro. § 999.

Negligence — what presents question of contributory — railroads — when verdict will not be disturbed — trial.

A motion for a new trial under section 999 of the Code of Civil Procedure will not be granted upon "exceptions" unless they relate to matters which affect a substantial right of a

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party, or on the ground that the verdict is not supported by the evidence, unless the evidence is insufficient as a matter of law to sustain the verdict, or on the ground that the verdict is against the weight of evidence where there is a conflict of evidence upon which reasonable minds might differ.

The construction of a platform or sidewalk approach to a station with the edge so close to the rail that the bumper beam of an engine overhangs about four inches beyond the edge of the platform, the operation of an engine along the platform to the station at a high rate of speed and the maintenance of the platform so as to allow water puddles to accumulate upon it requiring a person using it to go around the puddles which would bring him close to the edge of the platform, if he passed to the left approaching the station, presents a question of negligence for the jury on the part of the railroad upon which reasonable minds might differ and their verdict will not be disturbed.

The use of a sidewalk or platform as an approach to a railroad station by a person going to the station, who, to avoid a puddle of water on the platform, walks so close to the edge of the platform as to be struck by the overhang of the bumper beam of an engine approaching at a high rate of speed from the rear, while a passing freight train is making considerable noise, presents a question of contributory negligence for the jury upon which reasonable minds might differ and the verdict will not be disturbed.

MOTION by defendant for a new trial on the judge's minutes.

Cheney, Phillips & Greene (Warren J. Cheney, of counsel), for motion.

John W. Hollis, opposed.

RODENBECK, J. I. The section of the Code of Civil Procedure under which this motion for a new trial is made substantially provides three grounds upon which the motion may be made: (1) that errors were made during the trial to which "exceptions" were taken; (2) that the verdict is contrary to the evi-

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dence, which includes the excessive or insufficient character of the damages and whether or not the verdict is supported by the evidence or is against the weight of evidence, and (3) that the verdict is contrary to law. Code Civ. Pro. § 999. These are the only grounds upon which a motion for a new trial may be made upon the judge's minutes but they are sufficiently broad to cover every possible ground which appears upon the record and which is not dependent upon extrinsic evidence, the latter ground being covered by another section of the Code. Code Civ. Pro. § 1002. While section 999 has been the subject of numerous decisions, no general and uniform rules under it seem to have been adopted. So far as the "exceptions" in the record are concerned, it is sufficient to say that they should be disregarded on a motion of this kind unless they affect a substantial right of a party. Code Civ. Pro. § 723. See Proposed Civil Practice Act, § 51. Where the verdict is "contrary to the evidence" in the sense that it is unsupported by any evidence the rule is simple. There must be evidence to sustain a verdict. This does not mean a "scintilla" of evidence but legal evidence sufficient to sustain the verdict. Insufficient evidence is no evidence in law *Matter of Case*, 214 N. Y. 199, 203. When we come to the subject of the weight of the evidence, however, we find a great diversity of expressions used by the courts as the ground upon which a verdict may be set aside for the reason that it is contrary to the weight of the evidence. This does not mean that a judge may weigh the evidence of the witnesses and grant a new trial if he does not agree with the conclusion arrived at by the jury. It is clear from all of the decisions that a new trial will not be granted on this ground if reasonable minds may differ as to the verdict.

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The courts have used varying expressions with reference to the cases in which a motion to set aside a verdict will be granted or denied on the ground that it is contrary to the evidence, as for instance that the preponderance of the evidence must be so "great" as to show passion or prejudice on the part of the jury (*Layman* v. *Anderson & Co.*, 4 App. Div. 124); that there must be an "overwhelming preponderance" of evidence against the verdict (*Franklin Coal Co.* v. *Hicks*, 46 id. 441); that the preponderance must be so "great" that the jury could not have reached its conclusion upon a "fair interpretation" of the evidence (*Jarchover* v. *Dry Dock, E. B. & B. R. R. Co.*, 54 id. 238); that a verdict would not be set aside where the evidence was so evenly balanced that "reasonable men might differ" as to its correctness (*Von Der Born* v. *Schultz* 104 id. 94); that the jury must have been moved to sympathy and passion to return a verdict against the "great weight" of the evidence (*Scott* v. *Barker*, 129 id. 241); that the verdict must "startle by its absurdity or suggest a suspicion of evil influence" (*Hospital Supply Co.* v. *O'Neill*, 10 Misc. Rep. 655); that the "overwhelming weight" of the evidence must be against the verdict and that it must have been the result of "passion or prejudice or a clear misapprehension of the evidence" (*Johnson* v. *N. Y. C. & H. R. R. R. Co.*, 40 id. 350); that a verdict should not be set aside unless the record indicates that it was influenced by "bias, passion, prejudice or corruption" (*Kingsley* v. *Finch, Pruyn & Co.*, 54 id. 317); that the evidence must be "overwhelming" to disturb a verdict (*Cheney* v. *N. Y. C. & H. R. R. R. Co.*, 16 Hun, 415); that a verdict must be set aside where the preponderance is "very great" even if there is a conflict of evidence (*Suhrada* v. *Third Ave. R. R. Co.*, 14 App. Div. 361); that there

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must have been an "abuse" of legal process (*Morss* v. *Sherrill*, 63 Barb. 21); that a verdict will be set aside where it is "most clearly and manifestly" against the evidence (*Culver* v. *Avery*, 7 Wend. 380), or "so flagrant as to show passion, prejudice or inattention to duty." *Cothran* v. *Collins*, 29 How. Pr. 155. While these and other decisions are not uniform in their expression of the grounds upon which a verdict will be sustained or set aside, there may be deduced the general rule applicable to all situations that where there is a fair conflict of evidence a verdict will not be set aside because contrary to the evidence when reasonable men may differ as to the conclusion arrived at and that it will be set aside when no reasonable man would arrive at the result reached by the jury upon a fair interpretation of the evidence. *Munday* v. *Nassau El. R. Co.*, 99 Misc. Rep. 28; *Von Der Born* v. *Schultz*, 104 App. Div. 94; *Hospital Supply Co.* v. *O'Neill*, 10 Misc. Rep. 655; *Morss* v. *Sherrill*, 63 Barb. 21, 27; *Perlman* v. *Brooklyn Heights R. R. Co.*, 78 Misc. Rep. 168; *McCann* v. *New York & Queens Co. R. Co.*, 73 App. Div. 305.

2. Examining the facts in the case at bar by reference to the latter rule the verdict should be sustained. One of the contentions made is that there is no evidence to support the claim of negligence against the defendant. This is based upon the proposition that the overhang of about four inches of the bumper beam of the engine with the other facts in the case did not constitute negligence. This position was urged upon the court at the trial but was overruled on the authority of *Dobiecki* v. *Sharp*, 88 N. Y. 203. Reflection has not changed the view of the court with respect to the authority of this case and until it is overruled or distinguished it must be followed. The contention under this authority rests upon the assumption that the

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accident occurred on the station sidewalk or platform but there was a sharp controversy on the trial as to the place where the accident actually occurred. The defendant claimed that plaintiff's intestate was struck while walking on the station platform. This was a very material question since the court charged that the verdict of the jury must be for the defendant if they found that the plaintiff's intestate was struck while on the crossing. There were two eye witnesses who testified on each side that they saw plaintiff's intestate struck by the engine. The engineer of the engine that struck him and the towerman testified positively that he was hit on the crossing while two witnesses called by the plaintiffs testified that he was not struck until he reached the station platform and two other witnesses testified that they saw him walking west on the platform before he was struck. There were corroborating witnesses on each side, the strength and weight of whose evidence was a question for the jury. There was a fair conflict of evidence with questions for the jury of credibility and of the effect to be given to evidence and inferences to be drawn therefrom. Under such circumstances the verdict of the jury that the accident occurred on the station platform and not at the crossing ought not to be disturbed since reasonable men might, upon fair interpretation of the evidence, differ with reference to this question and it cannot be said that no reasonable man could say that plaintiff's intestate was struck by the engine while he was walking on the station platform. The construction of a platform or sidewalk approach to a station with the edge so close to the rail that the bumper beam of an engine overhangs about four inches beyond the edge of the platform, the operation of an engine along the platform to the station at a high rate of speed and

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the maintenance of the platform so as to allow water puddles to accumulate upon it requiring a person using it to go around the puddles which would bring him close to the edge of the platform if he passed to the left approaching the station, presents a question of negligence for the jury on the part of the railroad, upon which reasonable minds might differ and their verdict will not be disturbed. *Dobiecki* v. *Sharp,* 88 N. Y. 203; *Ayres* v. *D., L. & W. R. R. Co.,* 158 id. 254; *Archer* v. *N. Y., N. H. & H. R. R. Co.,* 106 id. 589; *Paulding* v. *N. Y. C. & H. R. R. R. Co.,* 132 App. Div. 68; *Lehigh Valley R. R. Co.* v. *Dupont,* 128 Fed. Repr. 840; *Candee* v. *Penn. R. Co.,* 84 Misc. Rep. 506; *Carpenter* v. *Boston & Albany R. R. Co.,* 97 N. Y. 494; *Brassell* v. *N. Y. C. & H. R. R. R. Co.,* 84 id. 241; *St. John* v. *N. Y. C. & H. R. R. R. Co.,* 165 id. 241; *Kramer* v. *Brooklyn Heights R. R. Co.,* 190 id. 310; *Mullen* v. *Schenectady R. Co.,* 214 id. 300.

3. The contributory negligence of plaintiff's intestate was also a question for the jury. There were puddles of water on the platform and there was evidence that he was attempting to pass around one of those puddles when he was struck. The rule as to contributory negligence which applies at a railroad crossing does not extend to the case of one using a station platform. The assumption that plaintiff's intestate must have seen the approaching engine at the crossing had he looked as he was required to do does not apply to his position on the station platform if the accident occurred at that point and not on the crossing, and in determining whether or not he should have heard or seen the engine in time to have avoided going too close to the cement curbing or to have receded in time to have avoided the accident, is to be determined in view of the noise that the freight train was making and the other circumstances of the case

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which come within the province of the jury. He may not have exercised under the circumstances the care and prudence that an ordinary man would have exercised, but is not that a question for the jury and may not reasonable men differ upon that question? It might be said that he should not have gone under the gates at all and that a careful and prudent man would have remained outside the gates, but it is a question for the jury, not a question of law, whether or not an ordinarily careful and prudent man would have passed under the gates and proceeded on his way across the tracks while a freight train was passing. He was struck on the right hip and if the engine struck him while he was going westerly on the station platform he must have turned to the right sufficiently to enable his right hip to come in contact with the bumper beam of the engine. The explanation is that when he heard the engine whistle he turned to the right and was hit before he could save himself. The contention of the plaintiffs is that if the company had not been negligent in maintaining the station platform and in allowing the bumper beam to project over the station platform he would not have been struck and that it was not negligence on his part to turn as he did rather than to step sideways. His absence of contributory negligence is predicated upon the assumption that he had the right to use the entire width of the platform and was not chargeable with knowledge that the bumper beam extended over the platform. It cannot be said therefore as a matter of law that he was guilty of contributory negligence and, being a question of fact, the conclusion of the jury should not be disturbed upon this motion. The use of a sidewalk or platform as an approach to a railroad station by a person going to the station who to avoid a puddle of water on the platform walks so close to the edge of the platform as

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to be struck by the overhang of the bumper beam of an engine approaching at a high rate of speed from the rear, while a passing freight train is making considerable noise, presents a question of contributory negligence for the jury upon which reasonable minds might differ and their verdict will not be disturbed. *Brassell* v. *N. Y. C. & H. R. R. R. Co., supra; Paulding* v. *N. Y. C. & H. R. R. R. Co., supra; St. John* v. *N. Y. C. & H. R. R. R. Co., supra; Kramer* v. *Brooklyn Heights R. R. Co., supra.* Although the court may feel that the plaintiffs' intestate was guilty of contributory negligence if there was a question of fact to submit to the jury upon this subject it cannot now set aside the verdict because the court does not agree with the conclusion arrived at by the jury. *Layman* v. *Anderson & Co., supra; Franklin Coal Co.* v. *Hicks, supra.* It would not help a final determination of the case for the court to set aside the verdict. It is far better that the case should go to the Appellate Division to secure its judgment upon the questions involved.

The contention that defendant was prejudiced by the opening remarks of counsel is not available. The remarks in summing up were not prejudicial. Plaintiffs' counsel was advised by the court of the impropriety of his remarks as soon as objections were made to them and in this manner and by the charge of the court any improper influence due to such remarks was neutralized. Nor can it be said that the verdict is excessive. Plaintiffs' intestate was a substantial business man and while his earning capacity from his business was not relevant evidence there was sufficient evidence as to his life and character to justify the amount of the verdict. The motion is denied, with ten dollars costs.

Motion denied, with costs.

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Matter of the Last Will and Testament of HENRY L. CHURCHFIELD, Deceased.

(Surrogate's Court, Westchester County, April, 1917.)

Wills — holographic — when entitled to probate — what is sufficient to pass real estate.

A holographic will reading: "I request all my belongings, moneys, bonds and insurance to be left to my wife," etc., is sufficient to pass real estate owned by testator at his death, and is entitled to probate as a will relating to both realty and personalty.

PROCEEDING upon probate of a will.

S. Alton Ralph, for petitioner.

Frederick G. Schmidt, special guardian.

SAWYER, S. Petition for probate of the will of Henry L. Churchfield, late of the town of Bedford, county of Westchester, state of New York.

The special guardian consents that the will be admitted as a will of personalty, but objects to its being admitted as a will sufficient to pass realty.

Deceased was formerly butler in the employ of the Harriman family, and on June 6, 1905, when facing an operation, made a holographic will as follows:

"*June 6th,* 1905.

"I HENRY L. CHURCHFIELD,
"J. B. Harriman,
"Mount Kisco, N. Y.

"I request all my belongings, money, bonds and insurance to be left to my wife Marian Churchfield, and my two children, William H. Churchfield and Mary Margate Churchfield.

"HENRY L. CHURCHFIELD.

"GEORGE P. SAVAGE
"MAY BARRON."

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The attorney for the proponent admits that the deceased, at the time of making the will, in 1905, owned no real estate. The real estate which he owned at the time of the death was subsequently acquired.

It seems to me that the testator intended by his will to give, devise and bequeath all of his estate, both real and personal, to his wife, Marian Churchfield, and his two children, William H. Churchfield and Mary Margate Churchfield, share and share alike.

The will is holographic in character and was drawn by a man who was formerly a butler. The point to be considered is, how did he intend to dispose of his property at the time of his death? It seems to me that the will reads as follows: I request all my belongings; I request all my money; I request all my bonds; I request all my insurance to be left to my wife, Marian Churchfield, and my two children, William H. Churchfield and Mary Margate Churchfield.

The common usage of the word "belongings," at least by a lay mind, includes all property, whether real or personal, and there is nothing in this will to show a contrary intent.

By giving all the balance of his "belongings" to his wife, testator meant to give all the remainder of his property to her, the words "belong" and "belongings" having been used several times in the will. *Lee* v. *Moore's Exr.*, 93 S. W. Rep. (Ky.) 911.

The primary meaning of the words "to belong" is "to be the property of." The word "belonging" is aptly used to express ownership, and, as used in an indictment for larceny, is a sufficient expression of ownership. State v. Fox, 80 Iowa, 312.

The primary meaning, and also the common and ordinary meaning, of the word "belong," is to be the property of. *Gammon* v. *Gammon Theo. Seminary*, 153 Ill. 41.

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The word "belonging" as defined by the Century Dictionary and Cyclopedia, is "that which belongs to one; property, possessions."

There can be no doubt but that this testator intended in language plain and simple to make his wife and two children the recipients of his bounty, share and share alike.

The will in question is a valid will, both as to realty and personalty, and should be admitted as such.

Probate decreed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. HARRY BAFF, LOUIS WARNER, MAX SEKELEFF, CHARLES S. FRANK, GOODMAN LEVY, and PAUL ABELSON, Defendants.

(Court of General Sessions of the Peace, in and for the County of New York, April, 1917.)

Indictment — when motion to set aside, will be granted — pleading — grand jury — evidence — criminal law — General Business Law, §§ 340, 341.

On granting a motion to set aside an indictment with leave to resubmit the charge to the grand jury the same procedure should be followed as where a demurrer is sustained with like leave.

Where, upon sustaining a demurrer to an indictment under the "Donnelly-Anti-Trust Law" (General Business Law, §§ 340, 341) upon the ground that the acts charged in the indictment to have been committed by defendants did not constitute a crime, an order was entered granting leave for the resubmission of the charge to the same grand jury and a new indictment is returned without the taking of any additional testimony, a motion to set aside the new indictment for failure of the grand jury to examine the witnesses anew before finding the new indictment will be denied.

Where, however, in the record of the proceedings before the grand jury which returned the new indictment, which charged in substance that defendants organized a corporation

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as a medium to monopolize the sale of live and slaughtered poultry and to fix the prices thereof in certain designated sections of the city of New York, there is an absence of legal evidence to support the allegations that four of the defendants together with other persons mentioned in the indictment controlled seventy-five per cent or upwards of the poultry business in the designated locality or that they had sufficient control therein of such business so as to bring their conduct within the condemnation of the statutes relating to illegal combinations, and the record does not disclose what part of said business was controlled by the defendants and the other persons mentioned in the indictment and although incompetent testimony was received there was no competent evidence before the grand jury to connect defendants with the commission of the crime charged, a motion to set aside the indictment on the grounds that the evidence before the grand jury fails to show that defendants committed the crime charged in the indictment and that incompetent testimony was received in support thereof, will be granted.

MOTION to set aside indictment.

Samuel Markewich, deputy assistant district attorney, for People.

Kohnig, Goldsmith & Sitterfield, for defendants.

MULQUEEN, J. On December 5, 1916, the grand jury filed an indictment against the defendants charging them with the crime of making and entering into a contract, agreement and combination whereby a monopoly in the sale in this state of an article and commodity of common use was and might be created, established and maintained, and whereby competition in the supply and price of such article and commodity was and might be established and prevented.

The indictment was drawn under sections 340 and 341 of the General Business Law, popularly known as the Donnelly Anti-Trust Law. In substance it alleged that the five defendants organized a corporation as a medium to monopolize the sale of live and slaughtered poultry and to fix the prices thereof in Harlem and the

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Bronx of the city of New York, and that live and slaughtered poultry was an article and commodity of common use.

A demurrer was filed to this indictment upon the ground that the facts therein stated did not constitute a crime. My learned associate, Judge Nott, in a very able opinion held that the indictment was bad, and sustained the demurrer. *People* v. *Baff*, 98 Misc. Rep. 547. Among other things he said:

" It is not alleged that part or a percentage of the trade in poultry was controlled by these defendants. It does appear by the indictment that the business of the defendants, plus the business of the forty-one other individuals and firms not concerned in the commission of the crime, amounted to seventy-five per cent of the total business in poultry sought to be controlled. There is no allegation in the indictment that after the agreement of July 28, 1916, was entered into the defendants took any steps to persuade the other forty-one competitors to submit their business to the corporation or to submit to prices fixed by the defendants, much less that the forty-one other competitors did so agree. There is no allegation in the indictment that the defendants were in any position to influence by persuasion or coercion the forty-one other competitors to assent to the proposed contract. For aught that appears to the contrary, on the face of the indictment, the defendants may have been without any influence in the trade.

" The indictment does not predicate the criminality of the defendants upon their agreement with each other of July 19th, 1916; in fact the indictment itself shows that the six defendants could not, by an agreement among themselves only, have effected a monopoly or an undue restraint of trade as it appears that they, together with forty-one other competitors, controlled but seventy-five per cent of the business. Therefore,

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their agreement with each other would not in and of itself be deemed an infraction of the statute within the doctrine laid down by the Supreme Court of the United States, in *United States* v. *Standard Oil Company* (221 U. S. 1) and *United States* v. *American Tobacco Company* (id. 106). * * *

" There is no allegation contained in the indictment showing, or tending to show, that the defendants had any influence or control whatever over the forty-one competitors whom the defendants agreed shoud submit their business to them To paraphrase certain language used by the court in *United States* v. *Whiting* (212 Fed. Repr. 466), as it does not appear from the indictment that the defendants had any power or control over the poultry trade, they could not create a monopoly or restrain trade within the spirit of the *Standard Oil* and *American Tobacco Company Cases, supra.*"

On January 19, 1917, the very day that the order was entered granting leave to the district attorney to resubmit the charge to the same grand jury, a new indictment meeting the defects pointed out in the opinion of Judge Nott was filed by that body without taking any additional testimony.

The defendants attack the validity of the indictment under review by two separate motions, the first of which is based upon the ground that the same was found without any legal evidence to sustain it, in that the grand jury did not hear any witnesses, but relied upon the testimony given by the witnesses in the first proceeding; the second of which is based upon the grounds, among others:

A. That the facts are insufficient to constitute a crime;

B. That the indictment was found upon illegal and incompetent evidence.

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To sustain the point made in the first motion, counsel rely on the case of *State* v. *Ivey,* 100 N. C. 532, which supports their contention. I am, however, not inclined to follow that decision for the reason that it is too technical. It seems to me that it would be an idle ceremony for the same grand jury to rehear the same witnesses where it is of opinion that sufficient evidence was taken in the first proceeding to meet the objections which resulted in a demurrer being allowed to a defective indictment. I do not think it is an invasion of any of the constitutional rights of a defendant to permit the practice which was followed by the grand jury in this case.

My view of the matter is that convenience and expedition in the administration of the criminal law suggest not to condemn the course pursued by the grand jury in failing to re-examine the witnesses, particularly where an indictment is filed for the same crime.

There is no substantial reason why the procedure, where a motion to set aside an indictment is granted with leave to resubmit the charge to a grand jury, should not be followed where a demurrer is laid to an indictment with leave to resubmit the charge. *Commonwealth* v. *Clune,* 162 Mass. 206; *Commonwealth* v. *Woods,* 10 Gray, 447; *State* v. *Peterson,* 28 L. R. A. 324; *Nordlinger* v. *U. S.,* 24 App. D. C. 406.

If the minutes disclose that the record is destitute of sufficient proof to sustain the additional allegations of the new indictment or that the indictment was based upon illegal and incompetent testimony, a more serious question is presented.

In support of the second motion, it is urged by defendants that the indictment cannot be upheld for the reason that there is a total failure of legal proof to sustain the allegation in the indictment that the

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four defendants, above named, exclusive of the defendant Abelson, together with forty-one other individuals and firms mentioned therein, controlled seventy-five per cent and upwards of the poultry bought, slaughtered and sold in Harlem and the Bronx of this city.

It is well settled, by the leading authorities, both federal and state, that the law does not affix the brand of condemnation upon any contract, agreement or arrangement unless it unreasonably or unduly restricts trade or commerce or unduly or unreasonably restricts competition in the supply or price of an article or commodity of common use or tends to produce such results. In other words, it must be shown that the parties who seek to control or monopolize the avenues of industry, in order to prevent free and unrestricted competition in business pursuits, have sufficient power to control or possess effective means to dominate the particular business in which they are engaged. *Standard Oil Company* v. *U. S.*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, Id. 106; *People* v. *Baff*, 98 Misc. Rep. 547, opinion by Judge Nott; *United States* v. *Whiting*, 212 Fed. Repr. 466; *State* v. *Eastern Coal Co.*, 29 R. I. 254; *Marienelli* v. *United Booking Offices of America*, 227 Fed. Repr. 165; *People* v. *Dwyer*, 160 App. Div. 542; affd, 215 N. Y. 46; *People* v. *Sheldon*, 139 id. 251; *Cummings* v. *Union Blue Stone Co.*, 164 id. 401.

I have carefully read the record of the proceedings before the grand jury and I fail to find any legal proof which supports the allegations of the indictment that the persons mentioned therein controlled seventy-five per cent or upwards of the poultry business in the Harlem and The Bronx, or that they had sufficient control of the poultry business in that section of the city so as to bring their conduct within the condemnation of the law in relation to illegal combinations.

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There is absolutely nothing in the record to show what part of the poultry business was controlled by the defendants and the other persons mentioned in the indictment. The percentage of business controlled by the defendant and the other persons is based upon conjecture and speculation, rather than upon facts.

The testimony of Mr. Morrison, one of the attorneys, who assisted in the organization of the Harlem Live Poultry Association, to the effect that a vast majority of the live poultry dealers in the section of the city hereinbefore referred to joined the association, is no legal proof that these persons controlled the poultry business in this vicinity. He evidently must have referred to a majority in number. As was said in *Nat. Protective Assn.* v. *Cumming,* 170 N. Y. 321: "Mere numbers do not ordinarily affect the quality of the act. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view." It is possible that the parties to the present arrangement may have constituted a small proportion of the live poultry business and the minority who did not join the association may have controlled a greater percentage or proportion of this business.

In *United States v. Whiting, supra,* the court said: "This indictment charges a conspiracy in restraint of trade. It does not contain the allegations of indictment No. 454 as to the percentage of milk sold in the country districts for shipment to the Boston and Worcester markets, which was brought by the defendants, nor any allegations from which it can be inferred that the defendants either controlled or were dominating factors in the buying market in the country or selling markets in those cities. For aught that appears, they may have been *unimportant factors in each one.*"

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The testimony of Mr. Gordon, another attorney who assisted in the organization of the association above mentioned, in relation to the magnitude of the business controlled by it, was purely hearsay and should have been rejected by the grand jury, for the reason that Gordon specifically testified in answer to a question propounded by a grand juror as follows: "Now, gentlemen, what I have testified to was with respect to what happened every week. Of course, I don't know of my own knowledge. I am assuming that everything happened in accordance with the plan laid out. Whether it did or not, I don't know. I don't presume to know personally as to the principles of this operation."

Furthermore, if the acts of the defendants were to constitute a violation of the law, then Gordon and Morrison were clearly accomplices in the commission of a crime. Gordon testified that he conceived the scheme of the organization above mentioned and that he counselled and advised the defendants in their business affairs, and Morrison testified that he co-operated and was associated with him in the plan which brought the association into existence and that he also advised the defendants with reference to the management of their business. Likewise Nathan Neuman was an accomplice, for according to his testimony he became one of the agents of the association and aided and assisted it in carrying out the plan which resulted in the indictment of the defendants.

These three witnesses, being accomplices, as a matter of law, it is necessary, therefore, to sustain the indictment that their testimony should be corroborated by other evidence tending to implicate the defendants in the unlawful combination.

After a most careful examination of the record, I am forced to the conclusion that there is no competent

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testimony to connect the defendants with the commission of the crime (if any crime was committed). *People* v. *O'Farrell,* 175 N. Y. 323; *People* v. *Becker,* 215 id. 126.

The testimony of Altman, a bookkeeper of the corporation with which the defendants were connected, that he had prepared from books of said corporation a summary showing the volume of business transacted, the expenses of the business, the gross profits, the net profits, and the balance in the treasury of the corporation, was clearly incompetent and upon no conceivable theory was such testimony admissible against the defendants who were the officers of the corporation, for the reason that no proper foundation was laid, establishing that the entries in the books were made with the knowledge of the defendants, or that they authorized or caused such entries to be made, or that they had some connection with the entries therein. *People* v. *Levis,* 96 Misc. Rep. 513; *Rudd* v. *Robinson,* 126 N. Y. 113; *People* v. *Burnham,* 119 App. Div. 302; *People v. Burnham,* 120 id. 388. It is, therefore, clear that in the absence of proper proof, not only are the book entries of a corporation not evidence against a director or stockholder thereof, but likewise a summary prepared from the books of a corporation is also incompetent evidence against an officer thereof.

For the reasons herein stated the motion to set aside the indictment for failure of the grand jury to examine the witnesses anew before finding the present indictment is denied, but the motion to set aside the indictment upon the grounds that the evidence before the grand jury fails to show that the defendants committed the crime charged therein, and that incompetent testimony was received in support thereof, is granted.

Ordered accordingly.

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ASSIGNMENTS — Continued.
said amounts. That for moneys paid under the waivers of assignment in violation of the terms thereof the trustee was also liable to such materialmen. That the contractor was entitled to the balance of the contract price remaining after the city had paid the committee of his creditors for completing the work subject to the claims of legitimate lienors. Where the contract with the committee of the contractor's creditors provided that the committee should be paid the actual cost of completing the work and then "all lawful claims against the said fund on the part of materialmen, laborers or subcontractors" should be paid, and the balance paid to the committee as representing creditors, the committee thereby subordinated its own claim to the claims of materialmen, laborers and subcontractors, and in view of the city ordinance requiring protection of the claims of laborers and materialmen which had already accrued the original assignment to the trustee was subordinate to such claims. Federal Heating Co., Inc., v. City of Buffalo, 121.

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AWARDS — Continued.
sixty days thereafter in which to make their payments, is both unjust and invalid and cannot be sustained. The provision of section 988 of the Greater New York Charter (Laws of 1915, chap. 606) which, in street opening proceedings, gives the city the right to set off assessments against awards making the set-off effective as of the date the assessment was entered for collection, is as to an owner who receives an award, which under section 981 of the charter carries interest from the date of the report, and who is also assessed for benefits, unjust and illegal, as he is treated differently from an owner who merely receives an award or is merely assessed, in that he is deprived of interest to which every other owner of an award is entitled and is obliged to pay at least so much of his assessment as the award will pay, as soon as it is payable, though other owners who are merely assessed are given sixty days of grace without incurring any additional liability. Though at the time of the making of the awards and the assessments in a street opening proceeding instituted by the city of New York a certain person was the owner of certain property taken and assessed both the award and the assessment were made in the name of "unknown owners." Later petitioner became the owner of the award and of the property covered by the assessment and still later he sold the property subject to the assessment *Held*, that on his application for payment of the award the city was not entitled to have the award applied in partial payment of the assessment for benefit laid against the property which belonged to his predecessor in title. Matter of Nunez, 645.

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CARRIERS.

Of merchandise — Bills of lading — Actions — Lien — Judgments. — Where a common carrier accepts goods only for transportation over its own line, each successive carrier becomes the agent of the shipper and invested with the right to claim from him compensation for services rendered. A carrier which only agreed to transport a car-load of goods over its own line, which was entirely in the state of New York, handed to the agent of the shipper a receipt and took from the shipper a bill of lading which provided *inter alia* that the owner or consignee should pay the freight and all other lawful charges. The consignee upon being notified of the arrival of the goods, at destination in Jersey City, refused to receive them and the shipper upon being notified of such refusal gave the matter no further attention, whereupon plaintiff, the last carrier, stored the goods, and six months later, in a proceeding under a statute of New Jersey, the goods were sold. In an action against the shipper to recover the amount of charges for freight, car service, unloading and storage, less the amount for which the goods were sold, *held,* that though it appeared that defendant, who did not pay the freight in advance, was not at the time of the delivery to the initial carrier the owner of the goods, the title thereto having passed before the signing of the bill of lading, which went into the hands of the shipper's successive agents, it was proper for plaintiff, the last of them, each connecting carrier having a lien upon the goods for unpaid freight, to pay the back charges for transportation to its line and recover the amount together with its own charges from the shipper. There being apparent lack of proportion between the value of the goods which were sold for fourteen dollars and the charge for storage, the cost of transportation should be added to its value in the hands of the plaintiff, and viewed in this light the conduct of plaintiff in storing the goods as required by the statute of New Jersey may not be condemned, and plaintiff is entitled to judgment for the amount demanded in the complaint. Central Railroad of New Jersey v. Berry, 560.

CERTIFICATE OF REASONABLE DOUBT.

Denial of — Appeal — Criminal law — Constitutional law. — Where defendant was convicted of a violation of section 1142 of the Penal Law upon proof that she sold an article to be used by women to prevent conception and in conjunction therewith disseminated literature dealing with the question of conception and setting forth various ways and means by which it could be prevented, a motion for a certificate of reasonable doubt on the sole ground that said statute is unconstitutional will be denied. Where an appeal from such conviction is undetermined the fact that the governor released defendant from imprisonment before the expiration of her sentence does not preclude a decision of said motion. People v. Byrne, 1.

CERTIORARI.

See **Taxes.**

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CHATTEL MORTGAGES.

Filing of — Lien of — Assignment for benefit of creditors — What does not constitute a fraud on creditors — Jurisdiction — Evidence — Statutes — Assignments — Judgments.— Neither the omission to file a chattel mortgage executed in good faith as security for a *bona fide* debt nor the mortgagor's retention of possession of the mortgaged property is necessarily evidence of fraud. A mortgage upon a collection of canceled postage stamps valuable as a curiosity or historical exhibit was given to plaintiff as security for a loan of corporate stock and, in the expectation that its use by defendant would be temporary, the collection was allowed to remain in his possession as he was continually adding to it and he informed plaintiff that as soon as he had certain stamps arranged he would send the collection to her, but after his failure to pay the note accompanying the mortgage and before he had made a general assignment for benefit of creditors plaintiff demanded and received possession of the stamps. *Held*, that in the absence of proof of fraudulent intent on the part of plaintiff the mortgagor's retention of the mortgaged property did not constitute a fraud upon his creditors. An unfiled chattel mortgage is good between the parties and cannot be attacked by creditors of the mortgagor or his assignee for the benefit of creditors until they have executions or attachments or other process under which they can make a levy. Judgment creditors armed with process and ready to make a levy have no right to levy upon any stamps which defendant had voluntarily delivered to plaintiff to secure or pay his debt to her. The fact that the law of the state in which the mortgaged property was when the mortgage was made permits an assignee for creditors to contest the right of the mortgagee under an unfiled chattel mortgage, in direct contradiction to the law of the state of New York, is ineffective, as the mortgagor and others having submitted themselves to the jurisdiction of a New York court are governed by New York law as to remedies. The statutes of both states as to the filing of chattel mortgages and the rights of creditors to take advantage of the non-filing thereof being the same, the means by which the creditor takes advantage of the non-filing relates to the remedy and is governed by the *lex fori*. Where a note evidencing a debt and a chattel mortgage given as collateral thereto represents transactions entered into in good faith by competent parties, the mortgage, though not filed as required by law, is evidence of the transaction actually entered into at the time it was given. The mortgagor having voluntarily delivered the mortgaged property to plaintiff neither the mortgagor, his assignee for creditors nor any other creditor may question the validity of plaintiff's claim to a prior lien, as, if the mortgage was void under the laws of the state in which it was executed and delivered, it still was evidence of the transaction between the parties and of the promise made and the security pledged, and if merely voidable it had never been legally avoided by any creditor before the mortgagee took possession. The Assignment Law of Ohio (General Code, §§ 11104, 11105), being in opposition to the common law and to the law of the state of New York, is not extraterritorial. Where an act done is valid in the state where the parties are and where the personal property to which said act relates is, it will be held valid in the courts of that state and also by interstate comity in the courts of the other states. Where the mort-

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CHATTEL MORTGAGES — Continued.
gagor's assignee for the benefit of creditors and a committee under agreement took assignments of the collection of stamps subject to plaintiff's lien they cannot dispute the validity thereof. Such of the stamps as were added to the collection after the mortgage was given to plaintiff and which came into her possession by the defendant's voluntary delivery and not by reason of the mortgage were subject to the lien thereof, and after the satisfaction of her lien the mortgagor and his assignee had an equitable lien on any stamps left and upon all surplus moneys acquired from their sale. Halladay v. Worthington, 141.

CITY OF NEW ROCHELLE.
See **Taxes.**

CITY OF NEW YORK.
See **Highways; Title.**

CITY OF WATERTOWN.
See **Constitutional Law.**

CIVIL SERVICE LAW.
Provisions of section 22 of — Who entitled to peremptory writ of mandamus — Appointments — Municipal service — City of Niagara Falls.— The word "held" in the provision of section 22 of the Civil Service Law that "If the position so held by any such honorably discharged * * * volunteer fireman shall become unnecessary or be abolished * * * the said honorably discharged volunteer fireman holding the same shall not be discharged from the public service, but shall be transferred to any branch of the said service for duty in such position as he may be fitted to fill," etc., includes a probationary as well as a permanent occupancy of the position. Where before the expiration of the probationary period for which relator, an honorably discharged volunteer fireman, was appointed to the position of foreman in the street department of the city of Niagara Falls, the position was abolished, resulting in his discharge from the city employment, he is entitled under section 22 of the Civil Service Law to a peremptory writ of mandamus providing for his transfer to some new position for which he is fitted. Upon again entering upon his duties in said municipal service relator will still be a probational employee entitled as of right to complete the unexpired portion of the probationary period, at the end of which he may be peremptorily discharged. People ex rel. Zieger v. Whitehead, 578.

CLOUD ON TITLE.
Removal of — Deeds — When assessment and sale of lands for unpaid taxes are void — When owner entitled to judgment.— Where lands assessed and sold for unpaid taxes cannot be identified in the assessment roll and the certificate of sale, both the assessment and the sale are void for uncertainty. Where property consisting of about twelve acres was described by appropriate metes and bounds in deeds of conveyance forming the chain of title, a sale by the county treasurer for unpaid taxes under an assessment to a certain named person, as owner, who never lived on or ever had any inter-

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CLOUD ON TITLE — Continued.
est in the property, which was simply described both in the assessment roll and the certificate of sale as eleven and one-quarter acres, no boundary line being given, the owner is entitled to judgment in an action to remove the certificate of sale as a cloud upon his title. Nolan v. Phillipi, 384.

See **Deeds; Foreclosure.**

CODE OF CIVIL PROCEDURE.
§ 22. Alfonso v. Alfonso, 550
§ 484. Mitchell v. Niagara, Lockport & Ontario P. Co., 366.
§ 542. Joyce v. Eastman Kodak Co., 361.
§ 724. Trustees of Masonic Hall v. Fontana, 497.
§§ 731, 732, 734. Wagman v. Bakst, 276.
§ 768. Joyce v. Eastman Kodak Co., 361.
§ 977. Joyce v. Eastman Kodak Co., 361.
§ 999. Munday v. Nassau Electric R. R. Co., 28.
§ 999. McStay v. Erie R. R. Co., 673.
§ 1012. Hicks Beach Co. v. Frost, 33.
§ 1496 *et seq.* Pure Strains Farm Co. v. Smith, 108.
§ 1638 *et seq.* Pure Strains Farm Co. v. Smith, 108.
§§ 1638, 1639. Moore v. Henderson, 344.
§ 1675. Smith v. Brotsch, 371.
§ 1750. McGill v. McGill, 86.
§ 1919. Heitkamper v. Hoffmann, 543.
§ 2486. Matter of Davis, 447.
§ 2490 (11). Matter of Davis, 447.
§ 2538. Matter of Strong, 243.
§ 2560. Duncan v. Mutual Life Ins. Co., 280.
§ 2565. Matter of Haag, 164.
§ 2615. Matter of McQueen, 185.
§ 2615. Matter of Farmer, 437.
§ 2753. Matter of Daly, 203.
§ 2753. Matter of Hamersley, 218.
§ 3357 *et seq.* Matter of Bronx Parkway Commission, 397.

CODE OF CRIMINAL PROCEDURE.
§§ 482a, 485a, 514a. People v. McIntyre, 17.
§§ 941, 943, 944a. People v. McIntyre, 17.

CODICIL.
See **Wills.**

COMMISSIONS.
See **Trustees.**

COMPLAINT.
See **Pleading.**

CONDEMNATION PROCEEDINGS.

1. *Proceeding to acquire land for street uses — When application for appointment of commissioners of estimate and assessment denied — Title — Greater New York charter,* § 992.— Where the city of New York, in disregard of the limitation of the resolution of the board of estimate and apportionment authorizing a street opening

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proceeding and of the clear, express and unambiguous wording of section 992 of the Greater New York charter, as amended in 1910, initiates a proceeding to acquire lands for street uses which have already been acquired by conveyance, the application for the appointment of commissioners of estimate and of assessment will be denied on the objection of property owners whose predecessors in title had conveyed to the city all of the real property within the the lines of the street in front of the lands owned by them. .The provisions of said section 992 are for the benefit of both the land owner and of the city to save costs and expense in a street opening proceeding. The court may not question the equity or propriety of the area of assessment as fixed by the board of estimate and apportionment in pursuance of its delegated legislative power. Matter of City of New York (Firth Avenue), 38.

2. *Power of board of estimate in — Street opening proceedings — Title — When motion to amend proceeding denied — Greater New York Charter,* § 992.— Under section 992 of the Greater New York Charter, added by chapter 606 of the Laws of 1915, relating to street opening proceedings, and which provides that "The resolution of the board declaring any such proceeding discontinued shall effect the discontinuance of such proceeding or such part thereof as may be discontinued," and further providing for the payment of the expenses incurred by the property owners of the portion of the street that is eliminated, the power of the board of estimate to discontinue proceedings before title to lands sought to be acquired has vested in the city is absolute without any application to the court; such provision, being merely a change in procedure, applies to a proceeding commenced before the enactment of said section. At the time of the institution of the proceedings authorized by the original resolution of the board of estimate there was a house which stood in the line of the improvement and, when it was subsequently destroyed by fire, the owner, in consequence of and in reliance upon the good faith of the board of estimate in notifying her that if she built upon the old site she might not recover in the proceeding the value of the building, erected a new building on the line of the proposed street making entrances to it from that street. Under an amended resolution thereafter adopted the plan of the new street will not be opened near her property and, as a result, she claims substantial damages. Upon a motion to amend the proceedings to conform to the amended resolution of the board of estimate, *held,* that though the board should have considered the situation of said property owner before it made the change by which she would be absolutely deprived of her street frontage in the face of her protests and of the presentation of the facts and circumstances showing her good faith, the action taken by the board was within its legal power and said property owner must be held not to have any legal cause for complaint. That as under the amended resolution the owners of the property abutting on the portion of the street which is not eliminated are burdened with the total expense of the entire proceeding, including the expense incurred in connection with the properties lying in the portion of the street that it is proposed to eliminate, a motion to amend the proceeding should be denied, the

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CONDEMNATION PROCEEDINGS — Continued.
amended resolution being illegal in that it attempted to require said property owners to pay expenses which should and must be borne by the city. Matter of Nagy Street, 314.

3. *Condemnation law — Question of ownership between conflicting claimants — Jurisdiction — Statutes — Code Civ. Pro.*, § 3357, *et seq.* — In a condemnation proceeding, which is purely statutory, the court possesses only such jurisdiction and powers as are expressly conferred by statute, and such other incidental powers as may be necessary to effectuate the scheme of the statute. Under the condemnation law (Code of Civil Procedure, § 3357 *et seq.*), which does not expressly authorize such procedure, the question of the ownership, as between conflicting claimants, of property to be condemned, cannot be determined upon a motion before the commissioners of appraisal have made their award; such a method of trial is not a necessary incident to the power conferred upon the court by the condemnation law. Matter of Bronx Parkway Commission, 397.

See **Awards.**

CONSTITUTIONAL LAW.

1. *Statutes — When legislature may in exercise of police power determine that general dissemination of information and sale of certain articles are prejudicial to morals — When motion for certificate of reasonable doubt denied — Appeal — Penal Law*, § 1142. — A statute which violates no constitutional provision will not be declared void because deemed by some to be opposed to natural justice. The legislature in the exercise of the police power may determine whether the general dissemination of information upon the subject of birth control and the sale of articles designed to prevent conception are prejudicial to public morals and inimical to the welfare and interests of the community. That some do not agree with such legislation and may feel aggrieved thereby does not make it unconstitutional, nor can it be deemed class legislation because those who favor birth control believe that the right to spread such doctrine should not be curtailed. People v. Byrne, 1.

2. *"Optional City Government Law" held unconstitutional — City of Watertown — Constitution — Statutes.* — Tested by the rule above stated, the "Optional City Government Law" (Laws of 1914, chap. 444), by the terms of which the electors of cities of the second and third class are permitted to vote on the adoption of any one of several forms of city government designated in said statute and which takes away the qualified negative of the mayor over hasty and inconsiderate action by the common council and confers autocratic power on that body to govern the city in such manner and by what means as it pleases without any limitation or restraint whatever save as to granting franchises, the sale or leasing of real estate, the incurring of municipal indebtedness and submitting propositions to the vote of electors or taxpayers and by which all provisions of the charter and of general or special laws in relation to the form of government of a municipality are superseded, is unconstitutional and void so far as applicable to the city of Watertown created by chapter 760 of the Laws of 1897, and a taxpayer's action lies to perpetually enjoin

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CONSTITUTIONAL LAW — Continued.
and restrain the officials thereof from organizing the city government under the provisions of said "Optional City Government Law." A provision of the said "Optional City Government Law," which permits the city council to do away with the restriction of the power of taxation in municipalities and fails to provide any limitation in its place, clearly violates the express command of section 1 of article XII of the State Constitution and cannot be held to be a valid legislative act. Granting that there are some features of said statute which in and of themselves would not be inimical to the Constitution the invalid provisions are so connected with the general purposes of the act and are so interwoven among its provisions that they destroy the whole act, and, as to eliminate the invalid provisions would be to divest the statute of its most essential features, the whole statute must be condemned. Cleveland v. City of Watertown, 66.

3. *Injunctions — Taxpayer's action — City of New York — Statutes — When complaint dismissed on merits — Laws of* 1911, *chap.* 777.—In a taxpayer's action to enjoin the board of estimate and apportionment of the city of New York from taking any action to carry into effect a certain contract with the New York Central Railroad Company in pursuance of chapter 777 of the Laws of 1911, which was enacted with the object and purpose of ameliorating the condition of grade crossing evils on the west side of the city, *held,* that said statute is constitutional and that its provisions, which are not mandatory, are still in force. That there is no merit in plaintiff's suit and there never was any justification for said action either in law or in morals, and defendants' motion for judgment for the dismissal of the complaint on the merits will be granted. Society for Prevention of Municipal Waste v. Mitchell, 552.

See **Equity.**

CONTEMPT.

Disobedience of injunction order — City of Elmira.— Where a contempt proceeding to punish defendant for violating an injunction order which restrained him as an individual from operating a bus line through city streets until he had authority from the city and a certificate from the public service commission, was discontinued upon his representations that he had in good faith complied with the injunction and had abandoned the use of his horse-drawn vehicle in the manner complained of and was no longer engaged in the business of transporting passengers through said streets, a further application to punish him for a violation of said injunction will be denied, with leave to renew, where it appears that the title to his horses and wagon had been transferred to others and that he was simply employed by them on a salary to act as driver. Public Service Commission v. Fox, 43.

CONTRACTS.

Written — Actions for breach of — Trial — Jury — Damages — Evidence.— Under a written contract, pursuant to which defendant agreed to make installment deliveries of a certain number of cases of goods, the first installment was promised for February 15, 1917, and deliveries were to continue during the spring and be completed in June, 1917, but in December, 1916, when the conditions of pros-

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CONTRACTS — Continued.
pective supply of the goods were very unfavorable, and it seemed possible that before the arrival of the time for the first delivery the shortage would force the market price far above the contract price, and, perhaps, make deliveries impossible, defendant notified plaintiffs that it would make no deliveries under the contract. After the commencement of an action to recover damages for breach of the contract, but before the first installment would have been due, market conditions changed and defendant notified plaintiffs of its willingness to perform the contract in all respects, including deliveries at the contract price on each of the specified dates, and four days after the delivery date for the first two cases and before plaintiffs would have been entitled to receive any of the remaining cases under the contract, the action was brought to trial. On granting a motion to set aside a verdict and to restore the case to the calendar for retrial, *held*, that the trial in advance of the delivery date did not preclude an award of compensatory damages measured by ascertainment of the probable market price on the future delivery date. That error in the jury's ascertainment of that probable market price was one of the risks which the buyer assumed in seeking trial before the arrival of the delivery dates. That plaintiffs were entitled to have the jury determine and award them for the first installment of two cases the difference between the contract price and the market price therefor on the delivery date, and also the jury's computation of the same difference as to the quantities deliverable on the dates enumerated in the contract down to June 1, 1917. That the market price of the goods for immediate delivery on the renunciation date was not controlling, nor was the price at which plaintiffs could on that date have made replacing contracts for delivery on the date specified in the broken contract. That plaintiffs to establish their damages were not required, on the renunciation date or at any time thereafter, to secure replacing contracts at the best market price obtainable for the whole or any part of the original contract, nor were they required to show the market price for the whole quantity of the agreed shipments by the indicated installment if sought to be procured from others. Goldfarb v. Campe Corporation, 475.

See Assignments; Evidence; Greater New York Charter; Lease; Personal Property Law; Statute of Frauds; Treaties.

CORPORATIONS.

1. *Reorganization of — Insolvency — Receivers — Actions — Injunctions — Equity.*—Where a corporation when insolvent or financially embarrassed transfers its property to a new company having the same shareholders, the transaction though binding between the parties cannot defeat the claim of a non-assenting creditor and as to it such a transfer is void in equity regardless of the motive with which it was made. The plan for the reorganization of a corporation, which as lessee operated a railway system, made no provision for unsecured creditors except that all claims against it would be contested or otherwise dealt with as its receiver or the new company or the joint reorganization committee or other proper authority might determine. Prior to the appointment of said receiver the stockholders of the lessor brought an action in equity

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against its lessee claiming mismanagement of the leased property and violations of the lease. *Held,* that as by the prosecution of a creditors' bill in a federal court in another state by the trustee for bondholders, in connection with the reorganization proceedings, the causes of action and rights of the unsecured creditors of the lessee, particularly the causes of action of the plaintiffs as preferred stockholders of the lessor, would be wholly or in part defeated, the prosecution of the creditors' bill will be enjoined, plaintiffs having been refused intervention in such proceeding. Clark v. Bankers' Trust Co., 300.

2. *Landlord and tenant — Judgments — Damages — Actions — Amendment — Courts — Code of Civil Procedure,* § 724 — *Municipal Court Code,* § 6(7).— Though it might be necessary for plaintiff in order to fix the amount of damages to prove the assets and liabilities of the corporation at the time of the prohibited transfer, plaintiff's recovery must be limited to the loss sustained, that is, the sum plaintiff would have received had the property of the corporation, upon its being wound up, been converted into money and applied to payment of its debts *pro rata.* In ascertaining the liabilities of the corporation neither rent accruing after the making of the prohibited transfer, nor the loss suffered by the lessor in reletting the premises at a lower rental, is to be included, since they do not constitute plaintiff a creditor who had suffered loss by reason of such transfer. The design and purpose of section 66 of the Stock Corporation Law being to secure equality among creditors, plaintiff cannot by means of the right of action given by said section be permitted to gain a preference which another creditor is prohibited from getting directly from the debtor by the same law. That the court was without power to amend its original judgment in favor of plaintiff by increasing it to an amount in excess of that stated in the decision of the court; such amendment and increase were not the correction of a judgment for an "error in form or substance" within the meaning and intent of section 6(7) of the Municipal Court Code; nor was such amendment within the power of the court under section 724 of the Code of Civil Procedure. Trustees of Masonic Hall v. Fontana, 497.

3. *When corporation controlled by German citizens is entitled to sue on debts contracted in time of peace — Who are not alien enemies — Treaties — Injunctions — Motions and orders* — A New Jersey corporation is a distinct entity and notwithstanding its practical control and ownership by a German corporation or by German citizens in control thereof is a citizen of the state of New Jersey and is entitled to the privileges and immunities of all citizens of the United States. The said corporation did not upon the declaration of war between the two countries become an alien enemy and is entitled to sue on debts contracted in time of peace. A motion to restrain *pendente bello* the prosecution of an action for debt brought by said corporation upon the ground that it was an alien enemy and, therefore, is *persona non standi in judicio* denied, with costs. Schultz, Jr., Co., Inc. v. Raimes & Co., 626.

See Equity; Injunctions; Jurisdiction.

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COSTS.

When application for, denied — Executors and administrators — Accounting — Attorneys.—Where a disputed claim for $340 for board and care of decedent's infant daughter was submitted to the surrogate for determination upon the judicial settlement of the accounts of the administratrix, and the claimant was allowed $320, no claim being made that the original claim was unreasonably rejected or resisted, an application by the attorney for claimant for an allowance of costs will be denied. Matter of Kohler, 233.

See **Executors and Administrators.**

COVENANTS.

See **Deeds.**

CRIMINAL LAW.

When pardon does not wipe out conviction for crime as affecting a second offender — Indictment — Evidence — Witness — Trial — Code Crim Pro. §§ 482-*a*, 485-*a*, 514-*a*, 941, 943, 944-*a*.—A pardon does not wipe out a conviction for crime to the extent of preventing it from being used as the basis of an indictment and proof upon a charge of being a second offender. Sections 482-a, 514-a and 944-a of the Code of Criminal Procedure relating to proof of prior convictions are not exclusive, and upon the trial of an indictment for assault in the second degree charged as a second offense, defendant's prior conviction may be shown either in accordance with the rules of the common law or by any other competent proof. Where defendant as a witness in his own behalf admits his prior conviction, an error in receiving an extract of the minutes of the prior trial which did not comply with the provisions either of the Code of Civil Procedure or the Code of Criminal Procedure, nor proved by any competent evidence, is harmless. Whether the defendant was a second offender was a question for the jury, and a charge that if they found that the assault for which defendant had previously been convicted came within the definition of assault in the second degree they should find him guilty as a second offender, though erroneous, was harmless, defendant having been convicted on the last trial only of assault in the third degree. Under sections 485-a, 941 and 943 of the Code of Criminal Procedure, requiring certain information to be transmitted to the secretary of state concerning the pedigree and previous record of one convicted of crime and authorizing his examination in order to obtain it, information as to former arrests of convicted persons not resulting in conviction is not required to be furnished, and it is clearly improper to admit in evidence on a subsequent trial the answers made upon an examination under said sections showing prior arrests. People v. McIntyre, 17.

See **Indictment; Jurisdiction.**

DAMAGES.

For seduction — When promise to marry will not defeat a recovery — Trial — Actions.—Where defendant admits that on a number of occasions he had illicit sexual intercourse with plaintiff when she was under eighteen years of age she is entitled to recover damages for the seduction, and an allegation that defendant accom-

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DAMAGES — Continued.
plished his purpose by a promise of marriage will not defeat a recovery. Colly v. Thomas, 158.

See **Contracts; Highways; Personal Property Law; Pleading; Replevin.**

DEEDS.

1. *What passes by—Descriptions contained in—Parties to—Mortgages—When no additional property passes—Insertion of words "being the same premises."*— Nothing passes by a deed of conveyance except what is described therein, no matter what the intention of the parties may have been. Where the description of land, by metes and bounds, stated in a purchase-money mortgage, does not include land in the street, the insertion of the words "being the same premises" conveyed to the mortgagor passes no additional property though the land in the street was expressly included in the deed to the mortgagor. Matter of City of New York (Lawrence Ave.), 24.

2. *Cloud on title — Removal of — Restrictive covenants in deeds — Equity — Actions — Mortgages — Code Civ. Pro.* §§ 1638, 1639.— Restrictive covenants in a deed of conveyance created for the benefit of property retained by the grantor are enforcible only by him or his grantees who owned the property benefited by the covenant against the owners of the property burdened thereby. Restrictive covenants entered into by various grantees pursuant to a general plan, on the theory of mutuality, are enforcible by the several grantees each against the other. S, the owner of a plot of land, subdivided the same into lots and in every deed affecting an interior lot, described by metes and bounds, the grantee covenanted that no building erected thereon should be situated less than twenty feet from the street; that no dwelling house should be erected on the lot of a value less than $5,000; that but one building should be erected on the lot and that no building of any kind should be erected thereon except a private dwelling, and each deed expressly stated the covenants should run with the land. Both of the corner lots were conveyed by S free and clear of any such restrictions and about two years after the erection of an apartment house on one of them, without objection from those who naturally would be most concerned, the grantee of the other corner lot, together with owners of certain of the interior lots, brought an action under sections 1638, 1639 of the Code of Civil Procedure to have the restrictive covenants canceled and removed upon the theory that plaintiffs and their predecessors in title were deceived into believing that S intended to restrict both the inside and corner lots. *Held*, that as it appeared that all that S did was to restrict the inside lots for the benefit of the remainder of his property the restrictive covenants were valid and binding and that the relief asked could not be granted as against the protest and objection of the holder of a mortgage on said apartment house. Moore v. Henderson, 344.

See **Actions; Cloud on Title; Injunctions.**

DEMURRER.

See **Pleading.**

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DEVISE.
See **Wills.**

DOMICIL.
What constitutes — Statutes — Evidence — Effect of amendment to section 243 of the Tax Law.— Though "domicil" and "residence" are different legal conceptions, "residence" may be used in a statute with the legal significance of "domicil." The Transfer Tax Law of this state divides the persons who may make taxable transfers into two classes —"residents" and "nonresidents." The domicil of a widow is *prima facie* that of her late husband and, though she may change it, the change, in order to constitute a new domicil, must be made *animo et facto.* Matter of Green, 582.
See **Transfer Tax Law.**

ELECTIONS.
What is a voting residence —When application to strike names from registry list denied.— For the purpose of voting, the "Home for Aged Men and Couples" in the city of Utica, N. Y., is the residence of its members, and an application to strike the names of male members from the registry list in the election district where the "Home" is located and from which they have voted for years will be denied. Matter of Merrill, 353.

EQUITY.
When action in, maintainable — Jurisdiction — Constitutional law — Corporations — Parties — Injunctions.—Where a court of equity has jurisdiction of the person, an action to restrain the prosecution of an action brought by him in a federal court of another state is neither a violation of the comity existing between the several states nor in violation of the Constitution of the United States and the laws passed under it having reference to the full faith and credit to be given to judicial proceedings in another state. Where the necessary parties are before a court of equity it is immaterial that the *res* of the controversy is beyond the territorial jurisdiction of the court. An action in equity is maintainable by stockholders for the purpose of avoiding any improper transaction consummated at the expense of the corporation either by it or the lessee of its franchise and such right of action passes with a transfer of stock. Clark v. Bankers' Trust Co., 300.

EVIDENCE.
When admissible — Trial — Contracts — Jury.— That what the market price of the goods in suit would probably be upon the dates enumerated in the original contract would be for the jury to determine as best it could from the evidence adduced on either side. That evidence of the market price and conditions on the first delivery date would obviously be admissible, as would likewise proof as to those prices and conditions before and after that date down to the day of trial. That evidence of the market price on the day of renunciation, though admissible if not palpably too remote would not be binding on the jury or fix automatically the recovery although, in the absence of proof as to later prices and conditions, it might sustain a verdict based on that figure on the theory of the presumed

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EVIDENCE — Continued.
continuance of a condition not shown to have been changed. That proof that inquiries among dealers in the goods had led to a quoting of a price and the actual purchase of goods at that price, even for less than the contract quantity, would be admissible if relating to a time not too remote. That competent evidence of the price at which, at the time of the trial, orders could be placed with responsible firms for delivery of the goods on the remaining delivery dates specified in the renounced contract would be admissible as an aid to the jury in reaching a conclusion as to what the price will probably be on the eventual date. That competent evidence would be admissible of prospective changes in conditions of supply, demand and the like, affecting market value before the delivery dates. That the offer of defendant to withdraw its repudiation and make delivery on the contract dates at the contract price was neither material nor competent upon the issue before the jury. Goldfarb v. Campe Corporation, 475.

See **Assignments; Chattel Mortgages; Contracts; Criminal Law; Domicil; Indictment; Injunctions; Lease; Mortgages; Negligence; New Trial; Statute of Frauds; Transfer Tax; Trial; Verdict; Wills.**

EXECUTORS AND ADMINISTRATORS.

1. *When refusal of letters testamentary to executor named in will not justified — Wills — Code Civ. Pro.* § 2655.— Upon an application for the refusal of letters testamentary to the executor named in the will on the ground that he is not entitled to serve by reason of incompetency and dishonesty within the intent and meaning of the law, in that he was required to account in an interlocutory judgment for moneys and property collected by him and that he had failed so to do and that he had intermingled his own funds with those of the decedent, *Held,* that a refusal of letters is not justified when the person nominated as executor in the will is indebted to the testatrix at the time of the latter's death; that it is no trivial matter to refuse letters testamentary to a person duly nominated, and that the will having been admitted to probate the person therein nominated as executor has a right to have letters issued to him and he should not be deprived of his right unless it clearly appears that he is incompetent on the grounds of disqualification enumerated in the Code or that the facts stated in section 2565 exist and the surrogate exercises his discretion. Matter of Haag, 164.

2. *Commissions of—Accounting—Attorneys—When compensation for legal services denied — Code Civ. Pro.* § 2753.— Section 2753 of the Code of Civil Procedure, as amended in 1914, is retroactive in its operation and thereunder an executor-attorney may be awarded compensation for legal services performed for the estate prior to September 1, 1914, when said section went into effect. The estate of a deceased executor-attorney is entitled to receive a reasonable sum in compensation for legal services, severable and apart from executorial functions, rendered to the estate of his decedent prior to September 1, 1914, in so far as a claim therefor is not barred by decrees entered either on intermediate or private accountings. The decree entered on the last intermediate accounting August 30, 1909, *inter alia,* fixed the basis of apportionment of commissions of the two executors and

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EXECUTORS AND ADMINISTRATORS — Continued.
provided for the distribution, in stated proportions, to the different beneficiaries, of the balance of the funds in their hands down to April 19, 1909, and that any moneys coming into the hands of the executors from and after said date from the profits of continuing the decedent's business as well as any moneys derived from other sources coming to the executors should be paid and distributed by them, after deducting expenses of administration and executors' commissions to be computed and apportioned on the same basis as the commissions allowed by the decree, to the same persons and institutions and in the same proportions as set forth by said decree. The executors accounted to the beneficiaries, distributed the additional assets, paid the administration expenses, deducted commissions as directed by said decree, and took from the beneficiaries general releases, under seal, from all claims and demands by reason of every matter embraced in said accounts. *Held*, that the executors and their representatives were bound to abide by the consequences of their own acts acquiesced in by every one interested in the estate and evidenced by over eight complete settlements between the executors and all other parties. That the executor-attorney was foreclosed from receiving additional compensation for legal services in connection with the acts embraced in the accounts and transactions between the parties from April 19, 1909, to December 31, 1913, and that an application by his legal representatives under section 2753 of the Code of Civil Procedure, for compensation for legal services rendered by him to the estate prior to the date when said section went into effect, will be denied but an allowance for legal services rendered after December 31, 1913, will be approved. Matter of Daly, 203.

3. *Accounting — When claim for legal services allowed — Costs.*— Where an administratrix solely for the benefit of the estate and for its preservation has incurred expenses for counsel fees which could properly have been paid from the assets of the estate but for her removal from office on the ground that certain of her individual property claims might be antagonistic to those of the estate, the court, upon her petition for the judicial settlement of her account, which asked that said claim be examined, proved and that any amount allowed be directed to be paid out of the assets in the hands of the present administrator, has full power to do justice between the parties; and where the proof as to the nature and reasonable value of the services rendered by counsel is not disputed, and no one asks that the matter be held for further proof, the claim will be allowed, but any directions as to its priority and payment must await the final decree entered upon the judicial settlement of the accounts of the administrator. Matter of Heinze, 226.

4. *Accounting — Advancements — Wills — Supreme Court — Jurisdiction.*—Where, upon the judicial settlement of the accounts of the administrators of the estate of one who had been judicially declared to be an incompetent after he made his will, it appears that by orders of the Supreme Court certain sums had been directed to be advanced in the lifetime of decedent to his putative heirs at law and next of kin towards their maintenance and support, but such orders failed to conform to precedent by directing the collation of the advances,

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EXECUTORS AND ADMINISTRATORS — Continued.
the surrogate is authorized to infer that the orders of the Supreme Court intend that the principle of *collatio bonorum* shall be applied in the Surrogate's Court upon the judicial settlement and distribution of the estate. While the surrogate is without power to pass on the validity of said orders he has jurisdiction to give them a construction consistent with precedent and equity. Matter of Farmers' Loan & Trust Co., 420.

See Costs; Wills.

EXEMPTIONS.
See Transfer Tax.

FALSE REPRESENTATIONS.
See Indictment.

FORECLOSURE.
Of mortgages — Judgment of — Actions — Deeds — Removal of cloud on title — When original mortgage is superior lien.— Where a creditor gives up a good security and accepts a worthless one in its place under a mistake of fact, he will be reinstated as to his original security if it can be accomplished without injury to the rights and equities of third persons. In an action to foreclose a mortgage it appeared that B., one of the defendants, because of a recorded conveyance purporting to be made by her to H., the testator of one of the other defendants, was not made a party defendant in an action previously brought by plaintiff's predecessor in interest to foreclose the same mortgage. That action proceeded to a judgment and sale and the property was purchased by said testator who as part of the purchase price gave to plaintiff in said action, the predecessor in interest of the plaintiff in the present action, a purchase money mortgage for the same amount as the mortgage under foreclosure, the balance of the purchase price being paid in cash. Seven years later, B. brought an action against H. to recover possession of the premises in question claiming that she never executed the purported conveyance to the testator of H. On the trial of the present action B., who in her answer alleged that said deed was a forgery, made no attempt to give evidence in support of such allegation and her counsel announced that he did not seek to impeach the deed. *Held*, that the plaintiff was entitled to relief as against B., who rendered the present action necessary by her repudiation of the deed, prior to its institution, and by her confirmation of such repudiation in her answer. That plaintiff, if so desirous, is entitled to a second judgment of foreclosure of the mortgage, the defendants other than B, making no objection, as such form of relief will have the effect as against B. of removing a cloud upon plaintiff's mortgage and settling the issue of the validity of the deed in question as between plaintiff and B. That there should be judgment in favor of plaintiff entitling her to enforce the original mortgage and reviving the same as against the defendants as an existing security for the payment of the principal and interest due thereon and adjudging that said mortgage is a prior and superior lien and that she have the usual judgment of foreclosure and sale, with costs against defendant B. Varick v. Higgins, 292.

See Mortgages.

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FRANCHISES.
See Taxes.

GENERAL BUSINESS LAW.
See Indictment.

GENERAL RULES OF PRACTICE.
Rule 37—Motion and orders—Affidavit—Code of Civil Procedure § 768.— Under section 768 of the Code of Civil Procedure and rule 37 of the General Rules of Practice where a notice of motion of ten days has been given and answering affidavits have been requested additional answering affidavits may be filed in the discretion of the court, if not as a matter of right, one day prior to the time at which the motion is noticed to be heard. Joyce v. Eastman Kodak Co., 361.

Rule 37, Joyce v. Eastman Kodak Co., 361.
Rule 66, Hicks Beach Co. v. Frost, 33.

GIFTS.
See Wills.

GRAND LARCENY.
See Indictment.

GREATER NEW YORK CHARTER.
§§ 149, 1541—*Provisions of — Contracts — Mandamus — When comptroller required to certify to sufficiency of available funds — Awarding of contract when appropriation made before acceptance of bids valid.*— Under section 149 of the Greater New York Charter, which declares that no contract made by any of the department heads shall be of any force unless the comptroller shall indorse upon it his certificate that there is an unexpended balance of an appropriation sufficient to cover the amount of the contract and that it shall be his duty to make such indorsement if there remains unapplied and unexpended such amount, the performance of said duty, a mere ministerial act, is enforcible by mandamus. Under said section the comptroller is required to certify to the sufficiency of available funds at the time he makes the certificate. The provision of section 1541 of the Greater New York Charter, prohibiting the head of any department from incurring any expense until an appropriation therefor has been made, does not require that the appropriation shall be made before bids for public work are invited; that the appropriation is made before the acceptance of the bids and the awarding of the contract is sufficient. Where bids for certain public work exceed the amount of an appropriation therefor an additional appropriation made before the bids were accepted is valid, and the comptroller should furnish the certificate required by section 149 of the city charter. People ex rel. Carlin Construction Co. v. Prendergast, 8.

See Awards; Condemnation Proceedings.

GUARDIANS.
Letters of — Power of general guardian — Insurance (life — Infants — Appeal — Code Civ. Pro. § 2650.—Where letters of guardianship granted after September 1, 1914, when section 2650 of the Code of Civil Procedure took effect, recite that the general

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GUARDIANS — Continued.
guardian shall act jointly with a named person in the collection and receipt of moneys and property of the infants, payment of the amount due them on a policy of life insurance, by a check drawn to the order of the general guardian individually and as general guardian without including the name of the person designated in the letters of guardianship to serve jointly with the general guardian, who was the father of the infants, is no defense to an action to recover on the policy. Duncan v. Mutual Life Ins. Co., 280.

HIGHWAY LAW.
See **Highways.**

HIGHWAYS.
Awards for damages sustained by change of grade — Interest — City of New York — Damages — When writ of mandamus issues — Highway Law, § 59-a.— The provision of section 59-a of the Highway Law, that whenever awards are made for damages sustained by a change of grade "the ward for the principal amount of damages sustained shall bear interest at the rate of six per cent. per annum from the time of the change of grade to the time of payment of the award," is of general application, and the receipt of the principal of an award for damages for the change of grade in front of petitioner's premises in the city of New York, and the giving of a receipt in full payment, without reserving the right to interest, is not a bar to a claim therefor, even though no demand for interest was made when the principal was received. Matter of Murphy v. Prendergast, 326.

INDICTMENT.
1. *Allegations contained in—Demurrer to, when disallowed—False representations — Grand larceny — Criminal law.*— It is well settled that a false pretense or representation, as understood in the criminal law, must relate to a past or present fact and not be the basis of an opinion, promise, or profession of purpose. Allegations in an indictment charging grand larceny in the second degree by means of false pretensions and representations, that defendant represented that he was able to have persons excused and exempted from military duty in the Italian army, and that he could and would have the complaining witness so excused, are but an expression of opinion and a promise and intention on defendant's part to obtain the exemption of said witness from such military service and do not constitute false pretenses and representations as understood in the criminal law, but where it is also alleged that defendant falsely represented that he was connected with and authorized to act for the Italian consul in the city of New York the indictment is good on demurrer. People v. Cerrato, 256.

2. *When motion to set aside, will be granted — Pleading — Grand jury — Evidence — Criminal law — General Business Law*, §§ 340, 341.— On granting a motion to set aside an indictment with leave to resubmit the charge to the grand jury the same procedure should be followed as where a demurrer is sustained with like leave. Where, upon sustaining a demurrer to an indictment under the "Donnelly-Anti-Trust Law" (General Business Law, §§ 340, 341) upon the

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INDICTMENT — Continued.
ground that the acts charged in the indictment to have been committed by defendants did not constitute a crime, an order was entered granting leave for the resubmission of the charge to the same grand jury and a new indictment is returned without the taking of any additional testimony, a motion to set aside the new indictment for failure of the grand jury to examine the witnesses anew before finding the new indictment will be denied. Where, however, in the record of the proceedings before the grand jury which returned the new indictment, which charged in substance that defendants organized a corporation as a medium to monopolize the sale of live and slaughtered poultry and to fix the prices thereof in certain designated sections of the city of New York, there is an absence of legal evidence to support the allegations that four of the defendants together with other persons mentioned in the indictment controlled seventy-five per cent or upwards of the poultry business in the designated locality or that they had sufficient control therein of such business so as to bring their conduct within the condemnation of the statutes relating to illegal combinations, and the record does not disclose what part of said business was controlled by the defendants and the other persons mentioned in the indictment and although incompetent testimony was received there was no competent evidence before the grand jury to connect defendants with the commission of the crime charged, a motion to set aside the indictment on the grounds that the evidence before the grand jury fails to show that defendants committed the crime charged in the indictment and that incompetent testimony was received in support thereof, will be granted. People v. Baff, 684.

See **Criminal Law.**

INFANTS.
See **Guardians.**

INJUNCTIONS.
1. *Action for — Corporations — Use of name — Unfair trade competition.*—Where defendant, the proprietor of a syndicate business, sold it and the right to use his name to a corporation, he may be restrained from engaging under his own name in the same kind of business in the same city, as may also a corporation thereafter formed by him to which he gave a name so similar as to cause such confusion and mistake as to amount to unfair trade competition. Wheeler Syndicate, Inc., v. Wheeler, 289.

2. *Who entitled to —Action for — Deeds — Mortgages — Damages — Water rights — Trespass — Evidence —Judgments.*—By a deed of conveyance of the lands now owned by plaintiff, made by the owner of the premises now owned by defendants, the grantor expressly reserved to himself and to his heirs, grantees and assigns the right to draw at any and all times as much water from a certain spring upon the granted premises as could be drawn and conveyed continuously through a certain pipe laid as described in the deed, and the grantee gave back a purchase money mortgage which recited that it was subject to identically the same reservation. Prior to the foreclosure of said mortgage, upon which plaintiff's title rests, the grantor became

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vested with the equity of redemption in both parcels and in the meantime assigned the first mortgage. He then mortgaged the premises now owned by defendants without any express reference to such reservation in favor thereof, and defendants derived their title through the foreclosure of that mortgage. Defendants erected upon their premises a cold storage warehouse for fruit and a plant for refrigeration and for the manufacture of ice for the refrigeration of cars shipped out of their plant and for the sale of surplus ice and for those purposes excavated a large well hole or cistern upon their own premises to a depth of nearly three feet below the level of the bottom of the spring on plaintiff's premises and thereby cut off the natural flow and percolation of water through their premises to said spring and accumulated the water in the well from which they pumped and used it, thereby excluding plaintiff from and depriving him of the use and enjoyment of his spring. In an action for injunctive relief, *Held,* that while the reservation of the water rights was covered by the mortgage, through which defendants claim as appurtenant to the mortgaged premises, and passed to the purchaser on foreclosure of the mortgage and to his grantees, such rights constituted a use of the water from the spring in part subordinate to the rights of the owner of the spring which had always been fed by the flow or percolation of water under the surface of the ground through defendants' lands, and otherwise in common, but not to the exclusion of the use of the spring by the owner. That defendants' use of the water although intercepted and taken wholly from their own land is unreasonable and in violation of plaintiff's rights entitling him to an injunction to confine such use to the reasonable requirements and enjoyments of their lands, as such, which will exclude the use of the water for manufacturing ice to be shipped out as refrigeration or to be used off the premises for any purpose to the diminuition of the flow of sufficient water to the spring for plaintiff's use in connection with his land. That since defendants have a lawful right to use the water in connection with their land and the comfortable and convenient use and enjoyment thereof, but not for a commercial purpose when that will interfere with plaintiff's use and enjoyment of the spring, the case is a proper one for alternative relief by way of permanent damages to the fee instead of injunctive relief. The fact that when the action was commenced there was a continuing trespass, consisting in the wrongful discharge and drainage of water upon and over plaintiff's premises, was sufficient evidence of a threatened continuance of the trespass to entitle plaintiff to an injunction in that regard, in any event. Dunbar v. Sweeney, 373.

3. *When employer may refuse to employ union labor — Associations — Labor unions — Judgments.*— An employer may refuse to employ union labor and stand upon his right to employ any one he chooses without assigning any reason therefor. A bakers' union upon the refusal of plaintiff to unionize his bake shop is within its legal rights in publishing and distributing a circular calling attention to the fact that plaintiff conducted a non-union shop, soliciting its sympathizers and friends to withdraw their patronage or to refrain from patronizing plaintiff. Where as a result of the various

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INJUNCTIONS — Continued.
acts complained of plaintiff's business has been injured, his receipts have materially fallen off and he has suffered many annoyances and inconvenience, and a continuance of these acts will result in his financial disaster, he will be granted a judgment against the individual defendants, the defendant union, its officers, agents and employees, restraining them and each of them from congregating in front of plaintiff's shop, from marching up and down upon the sidewalk in front of the shop, from blockading the entrance thereto and from in any way or manner preventing intending customers from entering or departing from plaintiff's shop or in any manner by threats, violence, intimidation or force interfering with plaintiff's employees or those who may seek employment from plaintiff. Heitkamper v. Hoffmann, 543.

4. *Pendente lite — When granted — Chattel mortgages — Executors and administrators — Surrogate's Court.*— A copy of a chattel mortgage given in 1914 was seasonably filed in the proper clerk's office, and the mortgage was refiled in 1915, but not in 1916. *Held,* that though the mortgage was invalid as against the creditors of the mortgagor, his administratrix, who was in possession of the mortgaged chattels, some of which were included in the inventory of the estate filed in the Surrogate's Court, will be granted an injunction *pendente lite* in an action to permanently enjoin the enforcement of the mortgage. Beebe v. Prime, 668.

See Contempt; Equity.

INSANITY LAW.
See Lunatics.

INSURANCE (FIRE).
Policy of — Meaning of "specifically assumed" — Actions — Trial — When motion for verdict denied.— Whatever is embraced within the real meaning of the written portions of a policy of fire insurance designed to express the actual risk assumed is a "special" provision intended to satisfy printed conditions of exemptions from a risk. Where the printed clause of a policy of fire insurance on machines and machinery of every description provides that the insurer shall not be liable for "loss to * * * patterns" unless liability is specifically assumed, and in the typewritten part of the policy the character of the risk assumed is stated to be "on all appurtenances, apparatus and supplies used in the business of the assured," liability for a loss on "patterns" which were models of castings to be formed for the assembling of printing presses in the course of the usual business of the assured was "specifically assumed" within the meaning of the policy. Bertine v. North River Ins. Co., 297.

INSURANCE (INDEMNITY).
Contracts of — Contents of policy of — Actions — Pleading — Judgments — Negligence — When motion for judgment on the pleadings denied.— Though a contract of indemnity insurance confers upon the insurer the exclusive power to control the defense of an action brought against the insured for personal injuries, there is an implied obligation on the part of the insurer to exercise good faith and fair dealing with the insured to fulfill the contract.

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INSURANCE (INDEMNITY) —Continued.
Defendant issued its policy of insurance whereby it agreed to indemnify plaintiff against any loss or expense not exceeding a certain amount arising from any claims upon plaintiff for damages on account of personal injuries suffered by any one as a result of accident during a certain definite period. The policy contained the usual clauses forbidding the insured without defendant's consent to settle or adjust any claim asserted against it, or to interfere in any manner with defendant's defense of an action brought upon such claim. The complaint, in an action by the insured against the insurer for its refusal to consent to the settlement and adjustment of a claim for which an action was brought against the insured by one who had sustained serious injuries on property owned by the insured, in which action judgment was recovered against plaintiff herein, which it paid, considered, and held sufficient and a motion by defendant for judgment on the pleadings will be denied as, against a demurrer, the allegations of fact were sufficient upon which to predicate the bad faith of defendant. Brunswick Realty Co. v. Frankfort Ins. Co., 639.

JOINT TENANTS.
See **Transfer Tax.**

JUDGMENTS.
When should be reversed — Pleading — Costs.— That the judgment in favor of defendant dismissing the complaint on the pleadings should be reversed, with costs, and judgment directed in favor of plaintiff for the amount claimed, with interest and costs, together with costs in the court below. Upland Realty Co. v. City of New York, 264.

See **Appeal; Chattel Mortgages; Foreclosure.**

JURISDICTION.
1. *Inspection of testimony given before grand jury —Actions — Criminal law.*— A motion for the inspection of the testimony given by a witness before the grand jury, and for a copy thereof for use upon the trial of a civil action, will be denied on the ground that the court has no jurisdiction to grant it. Mann v. Delaware, Lackawanna & Western R. R. Co., 358.

2. *Of surrogate — Wills.*— The jurisdiction of a surrogate to construe a will cannot be enlarged so as to enable him to determine the title of testatrix to certain personal property unless such an adjudication necessarily follows from a proper act of construction of the will. Matter of Farmer, 437.

3. *Of Municipal Court of city of New York —Actions — Corporations — Damages — Stock Corporation Law,* § 66.— The Municipal Court of the city of New York has jurisdiction of an action brought by a judgment creditor of an insolvent corporation against its directors for making a transfer of all its property, prohibited by section 66 of the Stock Corporation Law. Trustees of Masonic Hall v. Fortana, 497.

See **Equity.**

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LANDLORD AND TENANT.
See Lease.

LEASE.

1. *To foreign corporation — Landlord and tenant — What constitutes "doing business in this state" — Evidence.*— The subletting to different tenants, of a building in the city of New York leased to a foreign corporation under a lease delivered in this state, constitutes "doing business in this state." Cassidy's Limited v. Rowan, 274.

2. *Landlord and tenant — Negotiable instruments — Statute of Frauds — Contracts — Tender — Trial.*— In an action upon a check given for the first month's rent of premises, under a letting of five years, it appeared that when plaintiff received the check he signed and gave to defendant's president a paper in the form of a receipt which stated the parties, the terms of the lease and the agreed rental. Later defendant's president refused to execute a lease tendered by plaintiff solely by reason of the high rate of insurance that would be imposed, on taking possession, for the transaction of defendant's business. *Held,* that assuming that the so-called receipt did not comply with the requirements of section 259 of the Real Property Law, the defense that there was no consideration for the check because the agreement for letting was not in writing had not been established and a judgment in favor of plaintiff should be affirmed. Defendant having repudiated its agreement upon grounds for which plaintiff was in no way responsible, it was not necessary for plaintiff to make a formal tender of a lease at the trial. Rouse v. Halper, Inc., 494.

3. *Landlord and tenant — What is meaning of "consent" — Contracts — Evidence — Lien Law,* § 3.— There is a marked distinction between the passive acquiescence of an owner of property in that he knows improvements, which in many cases he had no right to prevent, are being made thereon, and his actual and express consent that the improvements shall be made; it is the latter that constitutes the "consent" mentioned in section 3 of the Lien Law. A mere general consent on the part of the owner that the lessee may at his own expense make alterations and repairs does not constitute "consent" within the meaning of the statute. Mere knowledge does not imply consent within the meaning of the statute nor do expressions of satisfaction with the work, where the landlord exercises no control or supervision over the performance of the contract. The lease of a roof garden, rented for a motion picture theatre, contained a direct notice to every materialman and contractor that the landlord would not be liable for any work done or materials furnished unless the conditions provided for in the lease were complied with in order to hold the landlord for liens or to liability. The landlord upon the express condition that the tenant should remain primarily liable for the rent consented to the assignment of the tenant's rights under the lease and after the undertenant had entered into possession of the roof garden, which is used for ball room purposes, it contracted for its decoration with plaintiff who in an action to foreclose a mechanic's lien for the balance due him on the contract sought to hold the land-

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LEASE — Continued.
lord liable on the ground that its officers and agents knew of the prosecution of the work from which it secured no material advantage and that certain plans were in the possession of its attorneys. *Held*, that the evidence was insufficient to establish the landlord's "consent" to the improvement, within the meaning of the Lien Law. An additional lien claimed by plaintiff for work done in fitting up the billiard room in the basement of the building under an oral agreement made with the undertenant cannot be sustained, the original tenant of the roof garden never having been a tenant of the basement. Valenti v. New York Theatre Co., 517.

LEGACY.
When lapses — Wills — Intestacy.—Where one-half of a residuary estate was bequeathed to a certain person, her heirs, executors or administrators, and the legatee predeceases the testatrix, the legacy lapses and passes to the next of kin of the testatrix as in the case of intestacy. Matter of Child, 463.
See **Wills.**

LIEN LAW.
Section 2 — When valid mechanic's lien created — City of New York — Laws of 1901, *chap.* 580.— Under section 2 of the Lien Law, a valid mechanic's lien may be created and enforced against a "Carnegie Free Public Library" established in the city of New York under the authority of chapter 580 of the Laws of 1901. Sexlause & Lemke v. Burke & Sons Co., 557.
See **Assignments; Lease.**

LUNATICS.
Commitment of lunatic to state hospital as poor person — When claim against estate of decedent rejected — Waiver — Insanity Law, § 85.—Where at the time of the commitment of decedent's husband to a state hospital, as a poor person, neither he nor she had any means except her ability to work, and during her lifetime no proceedings were taken to charge her for his care as an insane patient, a claim therefor against her estate, which had accumulated from her earnings as a domestic, after his commitment, will be rejected on the ground that even if it could have been enforced it had been waived by the state commission in lunacy in the exercise of the discretion conferred by section 85 of the Insanity Law and such waiver could not be recalled after the death of the wife. Matter of Cross, 199.

MANDAMUS.
1. *When writ of, denied — Education Law,* §§ 47, 48 — *Regents of the University of New York — When application to compel university to grant relators a rating upon examination papers denied.*— Information having been received by the Regents of the University during the months of February, March and April, 1916, that the principal of an educational institution incorporated by the regents had furnished its students with false certificates of attendance and had permitted them to take examinations without having regularly attended upon instruction as required by the regents' rules, it ap-

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MANDAMUS — Continued.
peared, upon investigation, that many of said students, including relators, did not attend upon instruction at the times and under the conditions required for attendance at registered secondary schools and that much of their instruction was given in violation of said rules and, as a result of the investigation, the registration of the institution as a member of the university was canceled by the regents July 1, 1916. *Held,* that as under sections 47 and 48 of the Education Law and the regents' rules the entire control and supervision of examinations conducted at said institution are conferred upon the Regents of the University and rest entirely within their discretion, relators' applications for peremptory writs of mandamus to compel the university to grant them a rating upon their examination papers of January, 1916, will be denied, though it appears that relators did not participate in the fraud of the principal of the institution. People ex rel. Ortenberg v. University of New York, 50.

2. *Alternative writ of — City of Dunkirk — Pleading — Contracts — Judgments.*— The issues presented by an alternative writ of mandamus requiring the common council of the city of Dunkirk to audit and pay the bill of relator for the sale of a motor-chemical fire apparatus and the answer of respondents, considered, and judgment awarded directing that the bill be audited and paid from any moneys legally applicable thereto and in the absence of such funds that the amount of such claim be included in the next tax levy. While a want of funds might have constituted a defense if pleaded and proven, it was a sufficient answer, to a contention that the purchase of said apparatus was unauthorized and the contract therefor invalid because the budget made no provision for relator's claim, that no such defense was interposed by respondents' answer. People ex rel. Mulholland Co. v. Nowak, 111.

3. *Peremptory writ of —When motion for, denied —Agricultural Law,* § 222.— Where the certificate filed by the manufacturer of a product known as "stonemeal" to be sold as a fertilizer, on his application to the commissioner of agriculture, under section 222 of the Agricultural Law for a license to do business in this state, shows that said product contains no nitrogen, no available phosphoric acid, no acid treated phosphate and no water soluble potash, but gives the analysis of the product showing that it is made up entirely of inorganic material, a motion for a peremptory writ of mandamus to compel the issuance of the license will be denied. Matter of National Stonemeal Co. v. Wilson, 664.

See Civil Service Law; Greater New York Charter.

MARRIAGE.

Annulment of —When court of equity may annul a —Actions — Code Civ. Pro. § 1750.—A court of equity may annul a childless marriage for fraud on proof that the defendant, who long prior to and at the time of the marriage was an incurable epileptic, not only concealed the fact from plaintiff but led him to believe that she was in good health, and that but for such concealment and misrepresentation plaintiff would not have married her. The provision of section 1750 of the Code of Civil Procedure that a marriage shall not be annulled on the ground of fraud if it appears

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MARRIAGE — Continued.
that at any time before the commencement of the action to annul the parties voluntarily cohabited with a "full knowledge of the facts constituting the fraud" means knowledge of which there can be no question. Plaintiff, upon discovery of his wife's epilepsy, was under no legal necessity or duty to abandon her, but was legally bound to care for her until a court of equity annulled the marriage, and that he cared for and continued to live with her in the same apartment, but without cohabiting with her, did not preclude his right to bring the action. McGill v. McGill, 86.

MECHANIC'S LIEN
See Lien Law.

MORTGAGES.
1. *Action for construction of trust mortgage — Liens — Pleading.* —A trust mortgage given by a navigation company upon one of its vessels then in course of construction considered, in connection with the bonds and the correspondence between the parties, to have been intended to cover the mortgaged property as a completed vessel. Where by the terms of the mortgage the mortgagor could withdraw, from the sinking fund, bonds deposited as collateral "to pay for new or additional vessels" or "extensions of or additions to or improvements of a permanent nature" to vessels, providing the cost should be twenty per cent above amount of bonds withdrawn, the mortgagor was not authorized to withdraw bonds to apply on the cost of one of the mortgaged vessels long after it was completed and paid for, as such course would exhaust the security coming from the sinking fund without giving to the bondholders security of any kind in lieu thereof. As the trustee by the terms of the mortgage was permitted to pay reasonable compensation to an attorney which would constitute a lien upon the property, it was entitled to an allowance of counsel fees in an action brought by the mortgagor to obtain a construction of the mortgage. Hudson Navigation Co. v. Union Trust Co., 54.

2. *Assignment of — Satisfaction of — Foreclosure of — What is a good consideration — Evidence — Tender — Interest — Election of remedies — Parties — Pleading.*—By an agreement synchronous with plaintiff's assignment of a $3,500 mortgage, as security for a loan of $2,000 made by defendants to a third party, defendants were declared to hold a prior interest in the mortgage to the extent of $2,000 with right to collect the whole principal and interest, being accountable to plaintiff for her share, and upon receiving payment to satisfy the mortgage. Both the assignment and the agreement were recorded and payment upon the mortgage by the owner of the property to defendants together with an assignment to them of a mortgage of $1,000 on other property totaled less than the amount defendants were entitled to receive, but they executed a satisfaction piece of the $3,500 mortgage which was not yet due and surrendered it with the accompanying bond. The indebtedness for which said mortgage was assigned as security was then past due and had never been paid. The amount of prior liens on said property covered by the $3,500 mortgage exceeded the value of the property at the time said mort-

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gage was satisfied. At the time of the trial of this action by plaintiff to recover her share in the $3,500 bond and mortgage, the $1,000 mortgage which was subject to other liens had been cut off by a foreclosure and a deficiency judgment entered against the maker of the bond who was the same person who executed the $3,500 bond. *Held*, that under the terms of the participation agreement defendants, the holders of said mortgage under an assignment absolute on its face, had the right to foreclose the mortgage or sue for the debt, and that in either event plaintiff was not a necessary party plaintiff. That as to the debtor, the owner of the property, defendants were the owners of the mortgage with whom he could safely deal alone, and they having possession of the bond and mortgage any payment or settlement that bound them was also binding upon plaintiff. That the acceptance of the $1,000 bond and mortgage in the circumstances was a good consideration to make effective the agreement for the discharge in full of the $3,500 bond and mortgage and was, in the absence of fraud, valid as an accord and satisfaction extinguishing the debt and discharging the debtor from all liability either on the bond or on the mortgage. That while defendants could satisfy the mortgage if paid in full or even when not so paid if the maker of the bond was insolvent and if it was done to prevent a foreclosure of a prior lien and was replaced by another mortgage on the same property and plaintiff's interest not prejudiced, defendants had no right to extinguish the debt and discharge the lien of the mortgage unless it was paid in full, and that so to do without plaintiff's consent was in violation of her rights and that as by defendants' act she was deprived of her share in the debt and had no way of enforcing it defendants were liable. That an allegation of the complaint that the bond and the mortgage were for $3,500 was a sufficient allegation of their value and with a statement of plaintiff's interest to the extent of $1,500 was a statement of her damages and it was not necessary to plead the value of the bond and mortgage. That as the solvency and the ability of the makers of the bond were presumed in the absence of proof to the contrary, and the amount unpaid on the bond being *prima facie* the value of the security although the mortgaged premises were not of that value, the fact that they were worth less than prior liens did not show that plaintiff was not damaged. That there was a deficiency judgment against the debtor at the time of the trial, nearly two years after the satisfaction was given and the bond and mortgage surrendered, was immaterial, the only question being whether the debtor was solvent at the time the satisfaction was given. That it was not necessary for plaintiff to tender to defendants the amount due them from the third party, to secure which the assignment of the bond and mortgage had been made, as the value of the security was greater than the debt, and that plaintiff by defendants' act was injured to the extent of the balance of such value over the debt. That defendants have not received the amount of their interest in the bond and mortgage cannot be considered in determining the questions involved. That admissions in the answer showing that defendants had received more than their interest in the bond and mortgage while not binding and conclusive could properly be used as evidence against them. That after plaintiff learned of the satisfaction of the mortgage she

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MORTGAGES — Continued.
filed a notice of claim of her interest in it, asserting that it still existed, was not binding upon her as an election of remedies and did not affect her rights to any legal remedy which she possessed. Thomas v. Zahka, 333.

See **Deeds; Foreclosure; Injunctions; Transfer Tax; Wills.**

MOTIONS AND ORDERS.
See **Reference.**

MUNICIPAL CORPORATIONS.
See **Negligence.**

MUNICIPAL COURT CODE.
§ 6 (7). Trustees of Masonic Hall v. Fontana, 497.
§ 15. Wagman v. Bakst, 276.

MUNICIPAL COURT OF CITY OF NEW YORK.
See **Jurisdiction; Tender.**

NEGLIGENCE.
1. *Action for injuries — Evidence — Trial — Pleading — When motion for new trial and to vacate order dismissing complaint denied.*— Where in a negligence action for injuries sustained by falling into a coal hole in front of defendants' premises plaintiff testified that as she was passing along the street she stepped on something, felt herself falling, then landed on her right elbow, with her right leg in a coal-hole up to her knee, and that at the same time the cover of the coal-hole, as to the situation of which at any time prior to the accident there was no evidence, flew off and to a distance of about two feet. *Held,* that the mere happening of the accident raised no presumption of negligence. That it was incumbent on plaintiff to show negligence and either actual or constructive notice to defendants of a prior dangerous condition of the sidewalk, and a motion for a new trial and to vacate an order dismissing the complaint at the close of plaintiff's case will be denied. Miners v. Ausfresser, 236.

2. *Action to recover for personal injuries — Waiver — Pleading.* — In an action brought against Cornell University by a duly enrolled student in its Agricultural College, to recover for personal injuries sustained in consequence of the explosion of a mixture of chemicals in a glass tube, while she was performing a certain experiment in chemistry under the verbal instructions of one of the instructors, defendant should be protected or held liable by the same rules of law as are charitable institutions, and the waiver of any liability of the defendant for negligence, implied from the relation between it and plaintiff, precludes a recovery. The complaint herein considered, and demurrer thereto, on the ground that it fails to state a cause of action, sustained. Hamburger v. Cornell University, 564.

3. *Liability of hospital — Automobiles — Pleading — Verdict — Municipal corporations — When motion to dismiss complaint denied.*— The defendant maintains a hospital in which the poor are treated without charge and others, who can, are required to pay. Plaintiff, who was neither a patient nor a beneficiary of defendant,

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NEGLIGENCE — Continued.
was injured while riding in an automobile which was run into by an ambulance belonging to defendant in charge of its chauffeur. *Held*, that defendant was liable, though at the time of the accident the ambulance was responding to a call sent in by the police department, for which service defendant received pay from the city. Motions to dismiss the complaint and for the direction of a verdict in favor of defendant, on which decision was reserved, denied, and a general verdict for plaintiff directed on special verdict of the jury. Van Ingen v. Jewish Hospital of Brooklyn, 655

4. *What presents question of contributory — Railroads — When verdict will not be disturbed — Trial.*— The construction of a platform or sidewalk approach to a station with the edge so close to the rail that the bumper beam of an engine overhangs about four inches beyond the edge on the platform, the operation of an engine along the platform to the station at a high rate of speed and the maintenance of platform so as to allow water puddles to accumulate upon it requiring a person using it to go around the puddles which would bring him close to the edge of the platform, if he passed to the left approaching the station, presents a question of negligence for the jury on the part of the railroad upon which reasonable minds might differ and their verdict will not be disturbed. The use of a sidewalk or platform as an approach to a railroad station by a person going to the station, who, to avoid a puddle of water on the platform, walks so close to the edge of the platform as to be struck by the overhang of the bumper beam of an engine approaching at a high rate of speed from the rear, while a passing freight train is making considerable noise, presents a question of contributory negligence for the jury upon which reasonable minds might differ and the verdict will not be disturbed. McStay v. Erie R. R. Co., 673.

NEGOTIABLE INSTRUMENTS.
1. *Construction of "agreement binding upon the holder"— Extension of time of payment — When plaintiff entitled to recover on note against the makers and indorsers — Negotiable Instruments Law*, § 201.— The words "agreement binding upon the holder" in section 201 of the Negotiable Instruments Law, which declares that a person secondarily liable on the instrument is discharged "by any agreement binding upon the holder to extend the time of payment," etc., should be construed to mean an agreement binding upon the holder made with the principal debtor. Where upon the refusal of a bank to renew a note made by a corporation for a loan and indorsed by its stockholders one of them, plaintiff herein, upon purchasing said note gave her own note in part payment and as collateral security therefor left the sold note with the bank and upon payment of her own note took up and became the sole owner of the note held by the bank which could at any time it held said note as collateral accept payment or bring an action thereon, if requested by the indorsers, plaintiff is entitled to recover thereon in an action against the makers and indorsers. Brosemer v. Brosemer, 101.

2. *Bills, notes and checks — When negotiable — Meaning of words "value received with interest" and "as per contract"— Pleading.*— Although the words "value received with interest" in a promissory

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NEGOTIABLE INSTRUMENTS — Continued.
note are followed by the words "as per contract" of a certain date, the instrument is negotiable. Waterbury-Wallace Co., Inc. v. Ivey, 260.

NEW TRIAL.
When motion for, not granted — Verdict — Evidence — Code Civ. Pro. § 999.— A motion for a new trial under section 999 of the Code of Civil Procedure will not be granted upon "exceptions" unless they relate to matters which affect a substantial right of a party, or on the ground that the verdict is not supported by the evidence, unless the evidence is insufficient as a matter of law to sustain the verdict, or on the ground that the verdict is against the weight of evidence where there is a conflict of evidence upon which reasonable minds might differ. McStay v. Erie R. R. Co., 673.
See **Trial.**

PARTIES.
See **Mortgages.**

PARTITION.
See **Reference.**

PARTNERSHIP.
See **Transfer Tax.**

PAYMENT.
See **Accord and Satisfaction.**

PENAL LAW.
§ 1142. People v. Byrne, 1.

PERSONAL PROPERTY LAW.
"Sales Act" — Contracts — Damages — Date of delivery — Actions — Laws of 1911, *chap.* 571, § 148 (2, 3).— That portion of the Personal Property Law, commonly known as the "Sales Act" (Laws of 1911, chap. 571), including section 148 thereof, applies to contracts for the future delivery of goods. Where the buyer under such a contract, upon notification from the seller that it will make no deliveries, has commenced an action to recover damages for breach of contract, he is under no obligation to acquiesce in the seller's effort to withdraw its renunciation or accept delivery when tendered on the contract date. When the contract renounced relates to goods for which there is an available market at the time and place set for delivery, the law does not require the buyer to purchase goods, give replacing orders, or to do anything to reduce his damages below the difference between the contract price and the market value at the time and place set for delivery. Under section 148 of said "Sales Act" the buyer's duty to do what he can to lessen his damage because of the seller's renunciation of the contract applies only to cases in which there was no available market at the time and place set for delivery, where the goods could be purchased, or the buyer proposes to plead and prove special circumstances tending to show proximate damages of a greater amount than the difference between the contract price and the market price of the goods at the time when they should have been delivered. Subdivisions 2 and 3 of said section 148

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PERSONAL PROPERTY LAW — Continued.
do not authorize the renouncing seller to either plead or prove special circumstances tending to show that the proximate damage, *i. e.*, the loss which the buyer necessarily sustains, was less than the difference between the contract price and the market price, even though, before the date for any delivery arrived, the seller offered to do that which would enable the buyer to have full and prompt performance and avoid any loss at all. The "anticipatory breach" of a contract for the future delivery of goods, through the seller's announced intention not to perform, does not fictitiously move the specifications of the contract, as to the time of performance, ahead to the time of such repudiation and enable the buyer to regard the seller as liable for failure to perform a new obligation to perform, as of the date of the repudiation; but the "anticipatory breach" does confer, though not necessarily, an optional right upon the buyer to sue to recover damages admeasured as though the contract calls for performance as of that date. The provision of subdivision 2 of said section 148, that, in an action for failing to deliver goods, the buyer's measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of the contract, applies to goods for which there is an available market, only upon taking into account the provisions of subdivision 3 of said section by which the buyer of such goods is entitled to receive at least the difference between the contract price and the market price at the time and place of delivery and may recover a greater sum by pleading and proving special circumstances tending to show that his actual proximate loss was greater than that difference. Goldfarb v. Campe Corporation, 475.

See **Sales; Statute of Frauds.**

PLEADING.

1. *Complaint — Demurrer — Equity — Actions — Parties — Damages — Code Civ. Pro.* § 484.— A demurrer under section 484 of the Code of Civil Procedure will not lie to a complaint in equity when the subject of the action is certain land and the transactions involved in the action are connected therewith, although the complaint contains two or more causes of action, legal and equitable, where they all arose out of the same transactions, are embraced in one or more of the subdivisions of said section, are consistent with each other and the defendants are all interested in some part of the relief prayed for and different places of trial are not required. A complaint in equity which charges a defendant with false representations in obtaining a conveyance of land whereby more land was included in the conveyance than was agreed to be conveyed and with a failure to convey to plaintiff land which it agreed to convey, and which seeks to compel a conveyance to plaintiff of the latter land, subrogating him to a claim for compensation for a portion thereof appropriated by the state and making the owner a party to secure such conveyance and subrogation; to reform the deed of the first mentioned land; a reconveyance of the excess lands; damages caused during the occupancy of such excess lands under the alleged unlawful conveyance and the removal of structures on the property unlawfully conveyed, is not demurrable under section 484 of the Code of Civil Procedure. Mitchell v. Niagara, Lockport & Ontario Power Co., 366.

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PLEADING — Continued.

2. *Complaint — In action to foreclose mortgage — Judgments — Parties — Deficiency — Mortgages — When demurrer sustained.*— The interest of an heir at law of a deceased mortgagor in the mortgaged property is subject to be wiped out by a judgment in foreclosure and, in case of a deficiency, judgment may be entered against the administratrix of the deceased mortgagor, she having been made a party to the foreclosure action, and collected out of property coming into her hands in due course of administration. Where the complaint in an action to foreclose the mortgage sought to obtain judgment for deficiency individually against the widow and next of kin of the deceased mortgagor, who was personally liable for the mortgage debt, a demurrer by one of the heirs at law of the deceased mortgagor will be sustained. Buckley v. Beaver, 643.

3. *Allegations of complaint — In action by bank to recover amount of overdraft — Banks — Demurrer.*— In an action by a bank to recover the amount of a depositor's overdraft due to the issuance of a New York draft which exceeded the amount of his account, the complaint need not allege his promise to pay. Becker v. Fuller, 672.

See **Indictment; Judgments; Mandamus; Mortgages; Negligence; Replevin; Tender.**

POOR PERSON.

See **Lunatics.**

PROCESS.

Service of, must be in the English language — Publication — Actions — Divorce — When application for judgment denied — Code Civ. Pro. § 22.— Under section 22 of the Code of Civil Procedure all process, records, pleadings and proceedings in our courts "must be in the English language," and service of the summons by publication, in an action for divorce, in a newspaper printed entirely in the Italian language, is ineffectual though both parties to the action are Italians; and where the action is uncontested plaintiff's application for judgment must be denied and the complaint dismissed. Alfonso v. Alfonso, 550.

PUBLICATION.

See **Process.**

REAL PROPERTY.

Order requiring sheriff to put a person in possession of, granted — Code Civ. Pro. § 1675.— Under section 1675 of the Code of Civil Procedure an order of the court requiring the sheriff to put a person into possession of real property supersedes the ancient writ of assistance as to actions brought under title 1 of chapter 14 of the Code and may be granted *ex parte* in the discretion of the court. Smith v. Brotsch, 371.

See **Taxes.**

REFERENCE.

When motion to vacate and set aside order of reference granted — Partition — Motions and orders — Rule 66 of General Rules of Practice — Code Civ. Pro. § 1012.— The provisions of section 1012 of the Code of Civil Procedure and rule 66 of the

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REFERENCE — Continued.
General Rules of Practice are mandatory, and where one of the defendants in an action for the partition of real estate is an infant an order of reference to hear and determine entered upon a stipulation designating the referee is illegal and void. While a motion to vacate and set aside the order of reference will be granted that part of the motion which asks for the appointment of another referee to be selected by the court must be denied. Hicks Beach Co. v. Frost, 33.

REPEVIN.
When will not lie to recover possession of written instrument — Real property — Pleading — Damages.— Replevin will not lie to recover possession of a written instrument creating in plaintiff a life estate in certain premises, where the execution and the delivery of the instrument are put in issue by defendant's denial, as a finding that the instrument was in fact executed and delivered determines the title to real estate in question. The fact that plaintiff because of her inability to recover possession of said paper seeks to recover as damages her expectant expenses to be incurred in prosecuting an equity action to establish her title to a life estate is an admission that the real purpose of the replevin action is to determine her claim to the real estate, and the complaint must be dismissed. Walden v. Feller, 576.

RESIDUARY ESTATES.
See Wills.

SALES.
What constitutes — Parties — Actions — Appeal — Personal Property Law, § 129.— While the delivery of a victrola with an option to purchase at a certain price neither constitutes a sale nor a transfer of title until acceptance of the offer, yet where the buyer sells and delivers the victrola to another he does an act "inconsistent with the ownership of the seller" within the meaning of section 129 of the Personal Property Law, and, in the absence of fraud, the transaction becomes a consummated sale between the parties. While the seller may sue the buyer from him for the agreed purchase price, he cannot maintain an action in replevin against the one to whom said buyer sold the instrument, and a judgment for the dismissal of the complaint in such an action will be affirmed. Neal, Clark & Neal Co. v. Tarby, 380.

"SALES ACT."
See Personal Property Law.

SATISFACTION.
See Mortgages.

SEDUCTION.
See Damages.

SERVICE.
See Process.

SERVICES.
See Executors and Administrators.

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STATUTE OF FRAUDS.

Memorandum in writing insufficient to avoid the — Sales — Contracts — Evidence — Personal Property Law, § 85 (2).— A correspondence consisting of a letter from plaintiff to defendant and received by it, stating that plaintiff had placed an order with defendant's agent for certain goods of specified sizes to be shipped at certain times, and a postal card sent two days later by defendant to plaintiff, acknowledging an order of the previous day but in no way connected with the letter or order given to the agent, except by oral testimony, is not a sufficient memorandum in writing to avoid the Statute of Frauds. All the essential parts of an agreement of sale must be contained in the writings between the parties and cannot be supplied by oral testimony. It clearly appearing that the goods were not to be manufactured by defendant, the contract was not enforcible under section 85(2) of the Personal Property Law which was added thereto by chapter 571 of the Laws of 1911. Eagle Paper Box Co. v. Gatti-McQuade Co., 508.

See **Lease.**

STATUTES.

Validity of, how determined —City of Watertown — Optional City Government Law held unconstitutional — State Constitution, art. 12, § 1.— The validity of a statute is to be determined not by what has been done or what probably will be done but by what it is possible to do under its provisions. Cleveland v. City of Watertown, 66.

See **Awards; Chattel Mortgages; Constitutional Law; Domicil; Taxes.**

SUBSTITUTION.

See **Attorneys.**

SURROGATES.

Duties of — Lost wills — Code Civ. Pro. §§ 2486, 2490 (11).— As an incident to the duty of the surrogate under section 2486 of the Code of Civil Procedure to keep a book in which wills admitted to probate in his court must be recorded, he may, under section 2490 (11) of said Code, grant an order directing the correction of the record of a will *nunc pro tunc* as of the date of record although the original will appears to be lost. Matter of Davis, 447.

SURROGATES' COURTS.

See **Costs.**

TAXES.

1. *When becomes a charge — Delivery of assessment rolls — Awards — Condemnation proceedings.*— That the lien, charge or claim for the said taxes for the first half of the year 1913 against said property must be regarded as affecting only the city which became its owner on May 1, 1913. That neither upon the theory that the tax became a charge on March 28, 1913, when the assessment rolls were finally completed and delivered to the receiver of taxes, with direction for collection of all taxes set forth therein, plaintiff being then the owner of the property, nor upon the theory that plaintiff was such owner on May 1, 1913, was defendant entitled to deduct the tax from the award due to plaintiff. Upland Realty Co. v. City of New York, 264.

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TAXES — Continued.

2. *What assessment roll should contain — City of New Rochelle — Tax Law*, § 21(2).— Due process of law demands that an assessment roll contain a description of the property sufficient to identify the land intended to be assessed. Under the provision of the charter of the city of New Rochelle which requires that property shall be designated or described on the assessment roll with reasonable certainty, and the requirement of section 21 (2) of the Tax Law that assessment rolls shall state "the quantity of real property taxable to each person," an assessment on a house and lot as "No. 33 Woodbury street" is insufficient. McInnis v. City of New Rochelle, 388.

3. *Upon real property — When burden of paying taxes must fall upon remaindermen.*— Where the bulk of a testator's estate consisted of three parcels of real estate, only one of which was productive and the holding of the property during the last fifty years has greatly increased its value, all of which will inure to the benefit of the remaindermen, and a portion of one parcel of unimproved property remains unsold, the burden of the payment of the taxes thereon must fall upon the remaindermen and be paid out of the principal and not out of the income to the prejudice of the life beneficiary. Matter of Montgomery, 473.

4. *On franchises — Corporations — When assessment invalid — Statutes — Certiorari.*— Where a corporation has received franchises from both the state and federal governments, an assessment for the purposes of state taxation which includes both is invalid unless capable of separation. Telegraph companies which have accepted the provisions of the United States statute entitled "An act to aid in the construction of telegraph lines," giving to such companies the right to use the post-roads, have thereunder derived some rights or franchise from the federal government with which the states cannot interfere, and if such franchise or right is included in the assessment of their special franchise under the statute of the state of New York providing for the taxation of special franchises the assessment is invalid. As the state board is directed by the New York Tax Law to assess as part of the special franchise "all franchises, rights, etc." to use the streets, it must be assumed to have included in its valuation the rights derived under the United States statute and as the items cannot be separated the assessment, so far as the intangible property is concerned, cannot be sustained. People ex rel. Postal-Telegraph Cable Co. v. Tax Comrs., 523.

5. *Imposition of — Special franchises — What is property state may tax — When writ of certiorari dismissed.*— While a state cannot impose a tax upon commerce between the states or with foreign countries, it may tax real and personal property within its borders although used in interstate or foreign commerce, and a franchise to use the streets and highways granted by the state is property a state may tax. Whether a tax is on property and valid or a burden on interstate or foreign commerce and invalid is to be determined by the operation and effect of the tax and not by the form of the statute and depends on whether or not the tax is for the privilege of engaging in interstate or foreign commerce or directly reaches the transactions in such commerce or the profits or benefits to be derived

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TAXES — Continued.
therefrom or fluctuates or varies according to the volume of business done in such commerce. The tax on special franchises under the New York Tax Law is a tax on property and valid even where the corporation is engaged exclusively in interstate or foreign commerce. Where the property is part of a larger earning unit, the net earnings of the whole form no proper basis for determining the earnings of the part if the mileage included in the special franchise is the means of reaching the central point from which business emanates and to which it converges. People ex rel. Commercial Cable Co. v. Tax Comrs., 532.

See Cloud on Title; Title; Transfer Tax.

TAX LAW.
See Taxes; Transfer Tax.

TENDER.
When should be made — Action for work, labor and services — Pleading — Judgments — Code Civ. Pro. §§ 731, 732, 734 — *Municipal Court Code,* § 15.— Though by section 15 of the Municipal Court Code sections 731, 732 and 734 of the Code of Civil Procedure are made applicable to the Municipal Court of the city of New York, they only apply to a tender made after suit brought and before trial. Where in an action brought in the Municipal Court of the city of New York to recover for work, labor and services defendant pleads an agreement by plaintiff to perform the work and furnish the materials for a certain sum and claims in his answer that he tendered that amount to the plaintiff before the commencement of the action and that before the trial he had deposited the same into court, but no attempt was made to prove the tender and it was not claimed that the deposit covered any cost, a finding by the trial court that the amount of said deposit was owing to plaintiff and that judgment should be for defendant was erroneous, and a judgement was entered by inadvertence in favor of defendant for the amount of the deposit and costs will be reversed and judgement directed in favor of plaintiff for a like amount, and costs in the court below. Wagman v. Bakst, 276.

See Lease.

TERMS.
Technical — Meaning of "hotch-pot" — "Collatio bonorum." — "Hotch-pot" is a technical term in the common law. It is often used in later law to describe what in old custom and in equity and Roman law is known as collation or *"collatio bonorum."* Matter of Farmers' Loan & Trust Co., 420.

TITLE.
When vested in city of New York — Taxes — Condemnation proceedings — Pleading — Actions — Judgments — Greater New York Charter, §§ 914, 990.— On April 3, 1913, pending proceedings, as authorized by section 990 of the Greater New York Charter, to acquire title by condemnation to certain premises, including those of plaintiff, for street purposes the board of estimate and apportionment adopted a resolution declaring that upon May 1, 1913, the title in fee to each and every piece or parcel of land lying within

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TITLE — Continued.
the lines of a certain street should be vested in the city. Pursuant to section 914 of said charter, as amended in 1911, the taxes for the first half of 1913 became due and payable May 1, 1913, and a lien upon real estate subject to taxation. Plaintiff upon receiving payment of an award in the condemnation proceedings, at the request of the city comptroller, paid to the city the tax for the first half of the year 1913, with interest, upon its land taken in said condemnation proceedings, under a stipulation between plaintiff and the city to the effect that the taxes so paid were paid under protest and without prejudice to plaintiff's right to recover the amount thereof, and interest, or without operating as a waiver of plaintiff's right to enforce payment of the award, without paying the tax. In an action to recover the amount of taxes so paid, *held*, that the tax was not due and payable before May 1, 1913, and for that reason there could be no counterclaim or set off in favor of the city against the award due plaintiff. That there could be no question that plaintiff's title to the land in question ceased to exist April 30, 1913, and presumably the award granted to it was made on that basis. Upland Realty Co. v. City of New York, 264.

See **Condemnation Proceedings.**

TRANSFER TAX.

1. *What subject to — Taxes — Partnership — Constitutional law — Tax Lay as amended in* 1915, § 220.— Where a non-resident at the time of his death was a member of a firm whose principal place of business was in the city of New York, the amount of certain profits credited to him on the firm's books but not withdrawn continued to be partnership assets and subject to a transfer tax under section 220 of the Tax Law, as amended in 1915. The sum paid by the surviving partners under the terms of the partnership agreement to the personal representative of the deceased partner for his interest in all the other assets of the business, including the good will, was also subject to a transfer tax under said section of the Tax Law. Matter of DuBois, 219.

2. *Who entitled to exemption — Taxes — The word "sister" in section* 221-*a*(1) *of Tax Law (before amendment of* 1916) *construed.* — The word "sister" in section 221-a(1) of the Tax Law relating to taxable transfers (as it stood prior to the amendment of 1916) does not include one adopted as a daughter by the parents of a decedent, so as to entitle her to the exemption and rate of tax prescribed for a natural sister. Matter of Benson, 222.

3. *Taxes —Wills — United States Revenue Act of September,* 1916.— The tax imposed by the United States Revenue Act of September 8, 1916, upon the net estate of every decedent dying after the passage of the act, the rate being dependent upon the amount of the net estate left, is a tax upon the transfer of property and not upon the property itself. As under said statute the tax imposed thereby is due the year after decedent's death, the amount thereof should not be deducted from the assets of the estate before computing its value for the purpose of the state transfer tax which, imposing a tax on the value of property transferred by will or by the intestate laws, is due immediately upon the death of decedent. Matter of Bierstadt, 457.

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TRANSFER TAX — Continued.

4. *When opening of joint deposit account in bank not subject to — Taxes — Evidence — Tax Law,* § 220, *as amended in* 1915 *and* 1916.—Where a joint deposit account in a bank was opened in the name of decedent and another, subject to the check of either or survivor, prior to the amendments of 1915 and 1916 to section 220 of the Tax Law, which provides that, whenever property is held in the joint names of two or more persons payable to either or the survivor, upon the death of one the right of the surviving joint tenant shall be deemed a transfer taxable under the statute, said statute as so amended cannot be given a retroactive effect, and the deposit in question is not subject to a transfer tax it not being part of the estate of decedent nor a gift made in contemplation of death. While since as well as before said amendments to section 220 of the Tax Law the state comptroller may prove the ownership of the deposit in the decedent, no transfer tax can be imposed in the absence of such proof. Matter of Maguire, 466.

5. *Taxes — Joint tenants — When mortgages subject to transfer — Tax Law,* § 220(7), *as amended in* 1916.— Decedent, who died after the amendment of 1916 to section 220(7) of the Tax Law, and her husband had years before jointly invested in real estate mortgages which contained the following: "It is understood that the parties of the second part heretofore hold this mortgage as joint tenants, it being their intention that on the death of one the survivor shall absolutely own the same." *Held,* that said amendment was retroactive and that the mortgages were subject to a transfer tax thereunder. Matter of Wintjen, 471.

TRANSFER TAX LAW.

Who deemed a resident of state of New York — Taxes — Domicil — Evidence — Tax Law, § 220.— The amendment to section 243 of the Tax Law (Laws of 1916, chap. 551), which affects the law of domicil only in so far as to continue a residence for the greater part of twelve months, *prima facie* evidence of one element of domicil, construed. It appearing from the evidence given before the appraiser in a transfer tax proceeding that decedent did not reside in the state of New York for some part of each of twelve consecutive months of the twenty-four next preceding her death, she is not to be deemed a resident of said state for the purposes of the transfer tax within the meaning of said amendment to section 243 of the Tax Law. Proceeding remitted to the transfer tax appraiser for the purpose of appraising, under section 220 of the Tax Law, the estate of the decedent as a nonresident of this state. Matter of Green, 582.

TREATIES.

Construction of — When courts will take judicial notice that a state of war exists between United States and Germany — Actions — When subject of Germany may sue in our courts — Contracts.— The courts will take judicial notice that on April 6, 1917, by proclamation of the President, a state of war was formally declared to exist between the United States and the Imperial German Government. Under the treaty of 1799 between the kingdom of Prussia and the United States, which was affirmed by the treaty of 1828, and which

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TREATIES — Continued.
provides that if war should arise between the two contracting parties the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts, settle their affairs and depart freely, a subject of Germany may sue in our courts provided he is a resident here and entitled to the protection extended by the President's proclamation. Schultz, Jr., Co., Inc. v. Raimes & Co., 626.

TRESPASS.
See **Injunctions.**

TRIAL.
1. *Before jury in contested probate proceeding — Evidence — Wills — When motion to set aside verdict and for new trial denied.*— Where the jury in a contested probate proceeding had before them definite and substantial evidence tending to show the exercise of undue influence in the making of the will, and the absence thereof, and the only finding against proponent was that the will was produced by undue influence, a motion to set aside the verdict and for a new trial will be denied. Matter of Chapman, 183.

2. *Misconduct of — Jury — Evidence — Verdict — Parties.*— Misconduct not appearing upon the record of the trial such as communications with the jury is grossly improper but it may be disregarded by the court on a motion for a new trial unless it is of such a character as to affect a substantial right of a party to a fair, impartial and public trial of the case according to the evidence. The exhibition in the jury room of a coat worn by a party immediately after the commission of an alleged act of adultery, and also worn during the trial and while on the witness stand and which was called to the attention of the jury by having her arise to give the jury a view of it, is not such an act as can be said to have affected the verdict and is therefore not prejudicial. Litzenberger v. Litzenberger, 572.

See **Actions; Criminal Law; Evidence; Negligence.**

TRUSTEES.
1. *When commissions allowed to — Accounting — Code Civ. Pro.* § 2753.—While under section 2753 of the Code of Civil Procedure, as amended in 1916, commissions may be allowed to trustees upon the value of "real property," a decree entered in a proceeding where trustees are not accounting for real estate may not be amended so as to allow commissions on real estate held by them as part of the trust fund prior to said amendment. Matter of Hamersley, 218.

2. *Accounting by — Trusts — Wills — What disbursements by trustee chargeable to income.*— The rule is that taxes, repairs and other items strictly for the preservation of the subject matter of a trust are to be paid from the income unless it be exonerated by the expression or intimation of the will. The disbursements of a trustee for premiums upon a bond given by him pursuant to the decree of his appointment and for the rent of a safe deposit box leased under the direction of the court are chargeable to income. Matter of Boyle, 418.

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TRUSTS.
See Mortgages; Trustees; Wills.

UNDUE INFLUENCE.
See Wills.

UNITED STATES REVENUE ACT.
See Transfer Tax.

VENUE.
When motion for change of, denied — Municipal Court of city of New York — Action upon policy of fire insurance.—Where an action was brought in the Municipal Court of the city of New York, borough of Manhattan, second district, where plaintiff resided, to recover upon a policy of fire insurance covering property contained in his place of business which was located within the third district of the borough of Manhattan, defendants' motion for a change of venue to either that district or to the second district of the Bronx will be denied. Schaffer v. Mechanics & Traders Ins. Co., 487.

VERDICT.
When, should be set aside — Difference between trial judge and jury as to verdict — Evidence — Motions and orders — Code Civ. Pro. § 999.— There being no standard by which to determine the question, a verdict should rarely be set aside, and should not merely because of a difference between the trial judge and the jury as to what the verdict should be. The provision of section 999 of the Code of Civil Procedure that a verdict may be set aside when "contrary to evidence" is inclusive of all grounds upon which such action may be taken. Where in an action for personal injuries plaintiff was not entitled to recover if the accident happened as testified to by defendant's witnesses, and plaintiff was the only witness on her side as to how it occurred, and none of the witnesses is discredited, a verdict in favor of plaintiff is not palpably wrong and justice does not require that it be set aside. Munday v. Nassau Electric R. R. Co., 28.
See New Trial; Trial.

VESTING.
See Title.

VOTING RESIDENCE.
See Elections.

WATER RIGHTS.
See Injunctions.

WILLS.
1. *Construction of — Trusts — Intention of testatrix — Specific legacies — Meaning of "nephews and nieces."*— The expression "nephews and pieces," in a will will be construed to include "grandnephews and grandnieces" when necessary to effectuate the intention of the testatrix. At the making of the will of a testatrix who left an estate of about $20,000 she had two brothers living, nine nephews and nine nieces living and there were three children of a deceased nephew. She also had a grandniece, who was her namesake, whose parent was living, and by said will testatrix gave an

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absolute specific legacy of the same amount, with two exceptions, to each of her nephews and nieces, to each of the children of the deceased nephew and to the namesake and also a small gift to a stranger. She also created a trust in favor of each brother and gave him the income thereof during his life. Each of the provisions creating a trust disposed of the principal fund upon the death of the brother by dividing it among the "nephews and nieces, who shall then be living, share and share alike," and all the remainder of the estate was devised and bequeathed to the nephews and nieces in equal shares. *Held*, that as from the amounts of the specific legacies as compared with the residuum it was apparent that testatrix intended to distribute her estate in the main through the residuary clauses including the principal of the trust fund and used the specific legacies as a means of making such distinctions among her beneficiaries as she desired, and as in view of the fact of the size of the estate the small amount provided for each of the children of the deceased nephew by way of specific legacy would show a strong tendency towards substantial disinheritance, if the testatrix did not intend them to share in the balance of the estate remaining after satisfying the specific legacies, the testatrix intended to include among the "nephews and nieces" who would share in the residuary estate, including the principal of the trust funds, the children of her deceased nephew, and they took their respective shares *per capita*. Matter of Von Rimpst, 169.

2. *Provisions of — Trusts — Executors and administrators — When interest remains vested — Distribution.*— Testator at the time of the making of his will had a son and a daughter neither of whom was childless and at testator's death the son had three children and the daughter four. The will provided: "All the rest, residue and remainder * * * I direct my executors to divide into two equal parts and one of said parts I give to my executors in trust to hold and invest and keep invested, and to collect the rents, issues and profits thereof and to pay the same semi-annually to my son John W. Bogert during his life, and from and after his death, I give the principal and any accumulated income of said trust fund to the descendants of my son John W. Bogert *per stirpes* and not *per capita*. In making division of the remainder of said trust fund after the death of my said son John, I direct that it shall be so divided that the share of my grandson, Andrew F. Bogert, shall be less than the shares of the other children of my said son John by the amount then due upon a loan of five thousand six hundred and fifty dollars made by me to my said grandson and now unpaid." Testator's son died after him, leaving him surviving two of his children who claimed the whole of the principal of the trust fund, and the administratrix of another child of said son, who after testator's death and before the death of his father died without issue, claimed the share of the trust fund to which her intestate if living would have been entitled. *Held*, that as the will of testator contained no disposition in case of a death without issue the interest of said grandchild remained vested and passed to his representatives, and that the trust fund was payable to the surviving children of testator's son and to the administratrix of the one dying without

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issue in proportions which remain for adjustment. That the gifts were in common and would be in equal thirds except for the burden placed upon the share of Andrew which must be one-third of the fund less the amount due on the loan to him by testator, and when said share to Andrew has been ascertained by the deduction of the amount of his obligation the sum so retained is not to be added to the shares of the other children but remains undisposed of and must be distributed as if testator had died intestate. Matter of Bergen, 174.

3. *Directions contained in — Construction of — Residuary estate —Trusts — Postponement of payment over of corpus of estate — Gifts —Annuities — Jurisdiction — Executors and administrators — Accounting.*— The "divide and pay over" rule, that where the only words of gift are found in a direction to divide or pay at a future time the gift is contingent and not vested, will never be applied when to do so would nullify the express intention of the testatrix, but there are many exceptions to the rule, two of which are as follows: 1. If the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest will be deemed vested at the death of the testatrix. 2. Where there are words importing a gift in addition to the direction to the executors or trustees to pay over, divide or distribute. The residuary estate of a testatrix, who was the owner of no real estate at her death, was bequeathed to her executors in trust for certain purposes with a further direction to pay an annuity in a certain amount to a certain person until she should come into possession of other bequests under the will by which the executor, after making certain payments, was directed to take the remainder of the estate and apply the interest, dividends and proceeds thereof in equal parts to the use and support of two nieces and a nephew of testatrix and on the decease of any one of them, after necessary expenses had been taken out of his or her share, the remainder thereof should be equally divided between the survivor or survivors of them and a daughter of one of the nieces and the annuitant, and, upon the death of both nieces and the nephew, and after all expenses had been met, the principal with the interest of the trust fund was directed to be divided and paid over, one-third equally between the annuitant and the grandniece of testatrix and the remaining two-thirds equally among the executor and two other legatees. On application under section 2615 of the Code of Civil Procedure for a construction of the will, *held*, that it came squarely within the exceptions of the "divide and pay over" rule because, *First*. It is evident that the postponement of the payment over of the corpus of the estate was for the purpose of letting in the intermediate life estates. *Second*. The beneficiaries of the corpus of the estate are designated absolutely and there is no substituted gift to take effect in the event of their death. *Third*. The gift of a part of the income from the property is made to the annuitant until the time comes for her to receive her share of the corpus of the estate. *Fourth*. That the legatees of the one-third of the principal of the trust fund are by the terms of the will "to have and to hold the same (their share of the estate) to them and their heirs and assigns forever." *Fifth*. That from the whole will it is apparent that testatrix intended a present vested gift of the

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WILLS — Continued.
corpus of the estate, enjoyment of which was to be deferred until the death of the three life beneficiaries. That the trust attempted to be created is invalid and void because it suspends the absolute ownership of the property for more than two lives in being at the death of testatrix in violation of section 11 of the Personal Property Law. That the gift of one-third of the principal and interest of the estate to the annuitant, and the grand niece, was valid and vested in them, as was also the gift of the two-thirds of said principal and interest of the trust fund to the executor and the two other legatees, and accelerated so they are entitled to the possession and enjoyment thereof in the same manner and to the same extent as though there had been an immediate absolute gift thereof to them. That the gift of the annuity is void and the court has no jurisdiction in the present proceeding to determine whether the legacy to one of the legatees of the two-thirds of the principal and interest of the trust fund has been forfeited by reason of her having been a subscribing witness to the will and, as such, examined on the probate thereof, but the determination of that question will be postponed until and determined upon the judicial settlement of the accounts of the executor. Matter of McQueen, 185.

4. *Action to determine validity of — Trial — Evidence — Codicil — Undue influence — When verdict in favor of proponents directed — Code Civ. Pro.* § 2538.—Where in an action under section 2538 of the Code of Civil Procedure to determine the validity of a last will the jury is unable to agree, the court has power to direct a verdict. Upon the trial of such an action it was conclusively shown that the codicil to the will was executed with all the formalities required by statute and there was no sufficient evidence of undue influence to justify the submission of that question to the jury, and while the testimony disclosed many odd, unnatural and irrational acts of testatrix these acts were not continuous, and it was established beyond dispute that during many and long periods subsequent to the time the codicil was executed testatrix was entirely rational and of full understanding mind. Not only was there no evidence from which an inference could be drawn, at least by a layman, that testatrix was in an incompetent condition on October 20, 1910, the day she executed the codicil, but it was conclusively established that from October 16, 1910, until after October 20, 1910, she was in her normal and rational state of mind, conversant with her affairs and competent to look after them. Each of the subscribing witnesses, one of whom was a physician, relating in substance what occurred at the time of the execution of said codicil, testified that testatrix at that time was competent. Of four alienists called to testify as to her condition on that day two stated that in their opinion she was competent and the other two that she was incompetent. The question directed by the surrogate to be tried in the action was whether at the time of making said codicil testatrix was of sound mind and memory and capable of making the instrument. The jury disagreed and upon the court entertaining a motion by proponents for the direction of a verdict it was stipulated by the parties before the jury was discharged that the motion might be retained and that the court might direct a verdict in all respects as

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WILLS — Continued.
if the jury were present, whereupon the jury was discharged. *Held*, That the court having power to direct a verdict should do so and that accordingly a verdict in favor of proponents will be directed, establishing the validity of the will and codicil. Matter of Strong, 243.

5. *Devise contained in — Construction of — Meaning of "survivors and survivor of my children and the lawful issue of such of my children as shall be dead."*—Where a devise to each of testator's four daughters of one-fourth of his estate provided that on the death of one without issue her share should go to the "survivors and survivor of my children and the lawful issue of such of my children as shall be dead," and at the death of a daughter without issue testator had a daughter living and a son of a deceased daughter with issue and the issue of a deceased son of said daughter, the issue of the deceased daughter, though of two generations, take in equal division her share, one-half of the property devised, *per capita*. Matter of Van Cleef, 405.

6. *Devise contained in — Power of sale — Gifts — When wife entitled to residuary estate.*—Where testator devised and bequeathed all the rest, residue and remainder of his estate to his wife with the express wish and desire that she use and enjoy only the income and not dispose of any portion of the principal by will, except to their daughter, the wife, who was appointed executrix with a discretionary power of sale over testator's real estate, takes an absolute gift. Matter of Crawford, 416.

7. *Construction of — Jurisdiction — Bequests — Gifts — Code Civ. Pro.* § 2615.—A written demand by any party to a probate proceeding for a construction of a will, even where the petition does not request it, is a sufficient compliance with section 2615 of the Code of Civil Procedure, and the surrogate may proceed to construe the will. A bequest of personal property subject to the condition that after the decease of the legatee it shall be given to another is an absolute gift to the first legatee. A bequest of income of corporate stock with no mention of the remainder interest constitutes an absolute bequest of the stock. A bequest to one and in case of her death to another refers to the first legatee predeceasing testatrix and constitutes an alternative gift in such event to the second legatee. A bequest of one-third of the residuary estate to "the woman who shall take care of me in my last illness" is void for uncertainty. Matter of Farmer, 437.

8. *Construction of — Residuary estate — Meaning of "his heirs and assigns forever" — Mortgages — Evidence — Actions.*— Where by a wife's will her residuary estate was given to her husband, his heirs and assigns forever, with the understanding that he should give and turn over to her sister such part as remained undisposed of at his death, and in addition to a sum of money received from his wife's estate he came into possession, from the same source, of a parcel of real property which he mortgaged, and he dies leaving a will by which all of his estate was given to his sister and sister-in-law, the latter is entitled to recover such part of her sister's resid-

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WILLS — Continued.
uary estate as was not disposed of by her husband in his lifetime. While the words "his heirs and assigns forever" may be considered in determining the proper construction of the devise or bequest to the husband, their inclusion added nothing to the quality of the interest or estate which he would have taken without them. The money borrowed on the mortgage being identified and shown to have been intact in the savings bank at the husband's death, where it had been originally deposited, should be paid to the wife's sister upon the production by her of a certificate of a satisfaction of the mortgage. The evidence failing to identify the other moneys sought to be recovered, the action as to them must fail as it was at least necessary to show that that part of the property in the husband's possession at his death was clearly traceable to his wife's estate. Tillman v. Ogren, 539.

9. *Probate of, when denied—When instrument is not subscribed "at the end."*—Where the signature of a testatrix is preceded by the disposing parts of her will and followed by the nomination of the executor, the instrument is not subscribed by her "at the end" and probate thereof will be denied. Matter of Van Tuyl, 618.

10. *Holographic—When entitled to probate—What is sufficient to pass real estate.*—A holographic will reading: "I request all my belongings, moneys, bonds and insurance to be left to my wife," etc., is sufficient to pass real estate owned by testator at his death, and is entitled to probate as a will relating to both realty and personalty. Matter of Churchfield, 682.

See Executors and Administrators; Legacy; Trial; Trustees.

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